Petition

Office-Supreme Court, U.S.
FILED
AUG 10 1981
ALEXANDER L. STEVAS,
CLERK

81-271

No. 80-

In the
Supreme Court of the United States

October Term, 1980

PEOPLE OF THE STATE OF CALIFORNIA ex rel. EDWARD COOPER, CITY ATTORNEY OF THE CITY OF SANTA ANA, CALIFORNIA,

Petitioner,

vs.

MITCHELL BROTHERS' SANTA ANA THEATER, located at 1565 West 17th Street, Santa Ana, County of Orange, California; M.B.F.G. THEATER CIRCUIT, INC.; JIM GISH; ALLISON HONER CO., a partnership; UNITED ARTISTS THEATER CIRCUIT, INC.; CONTINENTAL AUXILIARY COMPANY, a California Corporation; BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, a National Banking Association; JAMES MITCHELL; ARTIE MITCHELL; DEMICH, INC., a California Corporation; MITCHELL BROTHERS FILM GROUP, a General Partnership; CINEMA 7, INC., a California Corporation; Does 1 through 100, inclusive,

Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION TWO

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Court of Appeal erred in upholding the Trial Court's Conclusion of Law XVI that closure of a theater as a public nuisance, after trial on the merits, was prohibited by the United States Constitution as a prior restraint under every set of circumstances, where the Trial Court also concluded that under the trial facts such relief would have been granted as to the Mitchell Brothers' Santa Ana Theater, except for such constitutional prohibition?

2. Whether this Court's decision in Vance v. Universal Amusement Co., Inc. requires that "beyond a reasonable doubt" be used as the burden of proof in a civil action to abate obscene motion picture films as a public nuisance?

3. Whether this Court's decision in Vance v. Universal Amusement Co., Inc., as construed and applied by the Court of Appeal in this case to preclude all civil public nuisance abatement and equitable sanctions against the exhibition of obscene motion picture films except the remedy of a personal injunction against a specific film, has deprived the plaintiff as the authorized law officer of the City of Santa Ana of federal rights under the 9th, 10th, and 14th Amendments to the U.S. Constitution?

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ON WRIT OF CERTIORARI TO THE COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION TWO

PETITION FOR WRIT OF CERTIORARI

The petitioner respectfully prays that a writ of certiorari be issued to review a judgment and opinion of the California Court of Appeal, filed in this proceeding on January 20, 1981.

OPINION BELOW

The opinion of the Court of Appeal, Fourth Appellate District, Division 2, is reported in 114 Cal.App.3d 923, 171 Cal.Rptr. 85. A copy of the opinion of the Court of Appeal appears at Appendix A-1 to A-36 to this petition. A copy of the opinion of the Trial Court appears at Appendix B-1 to B-161 to this petition.

JURISDICTION

The opinion of the Court of Appeal was filed on January 20, 1981. A timely petition for hearing in the California Supreme Court was filed on March 2, 1981. The California Supreme Court denied the petition on May 13, 1981. On May 18, 1981, the Court of Appeal filed its remittitur. This petition for certiorari was filed within 90 days from the date the judgment became final. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3) and Rules 17(b) and 17(c) of the U.S. Supreme Court.

STATUTORY PROVISIONS INVOLVED

The text of the following statutes and constitutional provisions is set forth at Appendix F-1 to F-22 to this petition: California Civil Code sections 5, 22.5, 3366, 3367, 3368, 3369, 3479, 3480-3484, 3490-3495, 3523; California Government Code sections 38771, 38773 and 38773.5; California Code of Civil Procedure section 731; California Penal Code Sections 311, 311.2, 370, 371, 372, and 373a; Rule 26(a) of California Rules of Court; First, Ninth, Tenth, and Fourteenth Amendments to the U.S. Constitution.

STATEMENT OF THE CASE

The following short titles are used hereinafter: "R.T." for Reporter's Transcript; "C.T." for Clerk's Transcript; "C/A.O.B." for Cross-Appellant's Opening Brief in the Court of Appeal.

On June 16, 1975, James Gish, the theater manager of the Mitchell Brothers' Four Star Theater [1] on Wilshire Blvd in Los Angeles, submitted an application to the City of Santa Ana, on behalf of M.B.F.G. Theater Circuit, a division of Cinema 7 Inc., for a business license to operate the Mitchell Brothers' Santa Ana Theater at 1565 West 17th Street, Santa Ana, California (R.T. 987 line 9-988 line 6). On July 14, 1975, United Artist Theater Circuit Inc., executed a 5 year lease of the premises at 1565 West 17th Street to M.B.F.G. Theater Circuit and, by addendum to the lease, dated August 1, 1975, executed by the defendants, James Mitchell and Artie Mitchell, Cinema 7, Inc., became the leasee in place of M.B.F.G. Theater Circuit, (R.T. 1003 line 12-1004 line 11).

1/ The efforts of the City of Los Angeles to halt the operations of the Mitchell Brothers Four Star Theater under the Red Light Abatement Law (Penal Code, sections 11225-11235), for acts committed during 1974, are chronicled in People v. James Mitchell et al., 64 Cal.App.3d 335, 134 Cal.Rptr. 358 (November 30, 1976).

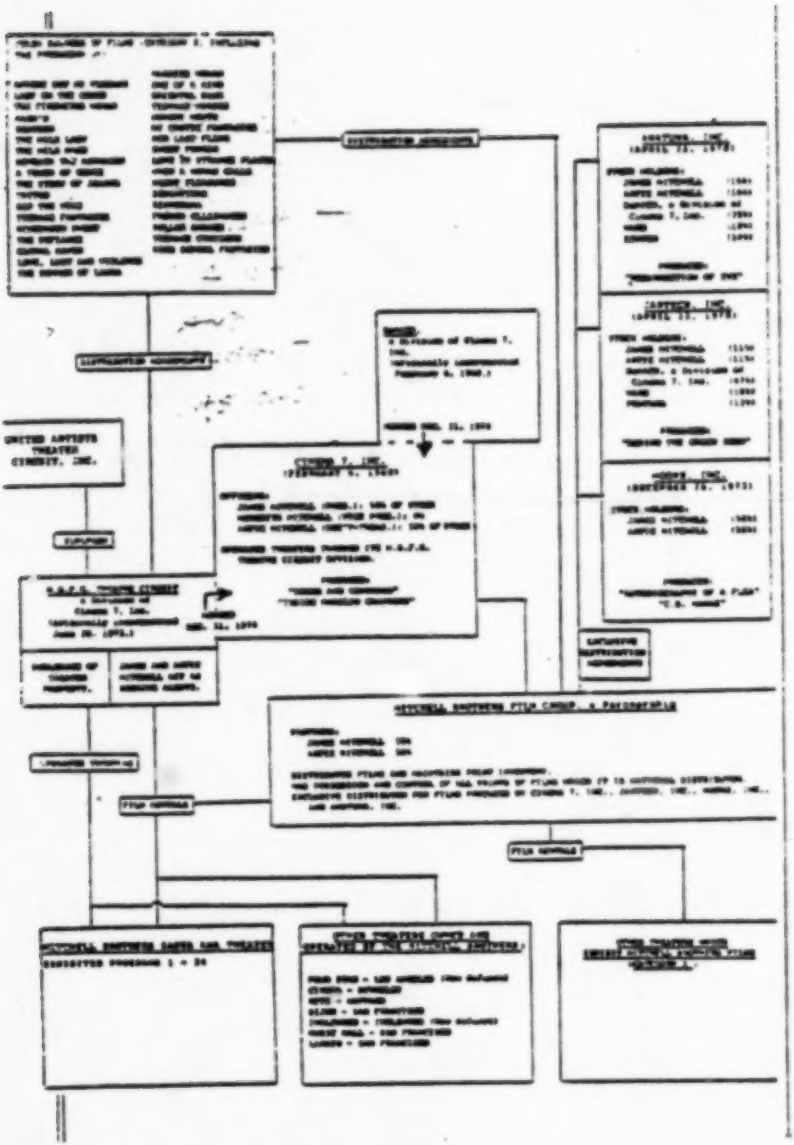
Thereafter, the City of Santa Ana issued a business license, and on September 3, 1975, the Mitchell Brothers' Santa Ana Theater commenced its operations under the new management. The first program offered a triple feature: "Sodom and Gomorrah", "Behind the Green Door", and "Resurrection of Eve" (R.T. 946 line 9-15; 1049 line 22-1050 line 5), all three of which were produced, directed, and photographed by James Mitchell and Artie Mitchell, and distributed and exhibited by them in their finished form at their own chain of theaters,[2/] acquired by them during the period 1973-1975, and operated as a theater chain under the name, "M.B.F.G. Theater Circuit". (Plaintiff's Exhibit No. 90, R.T. 1045 line 6-11). At the time they commenced their Santa Ana operations, they openly advertised their theaters in Northern California as "Mitchell

2/ Photo-reduced copies of the time and motion studies of the three films which were pleaded as Exhibits 1, 2 and 3 to the First Amended and Supplemental Complaint (C.T. 220 at lines 5-8), appear hereinafter at Appendix G, H and I.

Brothers Porno Theaters" (R.T. 1051 line 26) and the films which they had produced, directed, and photographed as "hard-core" (R.T. 1055 line 6).

The history of the growth of the operations of James Mitchell and Artie Mitchell, from 1969, as producers and exhibitors of sexually oriented films at their O'Farrell Theater at 895 O'Farrell Street in San Francisco, to their operations in 1975, when they billed themselves as "the Cecil B. DeMille and David O. Selznick of modern porn" (R.T. 1045), is described in the trial tesimony of James Mitchell, (C/A.O.B. at A-54 through A-84 and A-116 through A-137). An operational chart of the defendants' "pandering" businesses (Plaintiff's No. 77) appearing on the opposite page, was prepared from the testimony of James Mitchell.

The Mitchell Brothers' Santa Ana Theater was located in the Honer Plaza Shopping area, and adjacent to the First Christian Church, Orange County Social Service Dept.,



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Bank of America, Ralphs Market, Sav-On Drug-store, Montgomery Ward, Imperial Bank, and across the street from the Santa Ana Community Junior College (R.T. 711-713). The triple feature ran continuously from 11:00 A.M. TO 11:00 P.M., seven days a week, from September 3, 1975 through January 15, 1976 (R.T. 671). During that time it became a matter of publi. discussion on the agenda of the City Council (R.T. 1207).

In November of 1975, City Attorney Keith Gow employed special legal counsel to assist him, and a special investigator, Robert McGuire, who paid the admission price of $5.00 and began making regular photographic and sound surveillances of the programs being exhibited at the theater (R.T. 370-377). The special counsel was then employed by the City of Duarte in a motion picture theater public nuisance abatement case involving Duarte City Ordinance 369, which was subsequently approved as a procedural ordinance in People ex rel. Camil, City Attorney of Duarte v. Buena

Vista Cinema, 57 Cal.App.3d 497, 503, (1976).

Thereafter, public hearings were held and, on January 19, 1976, the City Council duly enacted Ordinance NS-1287 (R.T. 607 line 21-608 line 12) which was patterned after City of Duarte Ordinance 369, and also approved an "Agreement for Legal Services" for special counsel to assist City Attorney Keith Gow "in connection with litigation to abate conditions within the City, determined by the Council under the provisions of Ordinance No. NS-1287 to be public nuisance." (R.T. 1129). On Jan. 15th, the defendants stopped exhibiting their triple feature (which had run for 4 months) and commenced exhibiting other pornographic films.

On October 4, 1977, a unanimous Santa Ana City Council (R.T. 1212) duly enacted (R.T. 608 line 13-206 line 5) NS 1325 as an emergency ordinance to amend NS-1287 to apply a correction "required by the decision of the Court of Appeal in People ex rel. Camil v. Buena Vista Cinema" (See section

7 at R.T. 1212). Under the amendment, the City Council "upon a specific finding that a public nuisance" existed under the abatement ordinance, was required: "to order the revocation of all licenses and permits which have been issued as a part of the operation of such business, subject to confirmation by the Court in the judicial proceedings required herein. Criminal proceedings for transacting business without a license at such address shall not be filed until the order of license revocation by the City Council has been confirmed by judicial order."

On June 1, 1976, the California Supreme Court rendered its decision in People ex rel. Busch v. Projection Room Theater et al., 17 Cal.3d 42, 130 Cal.Rptr. 328 (June 1, 1976) upholding the application of Civil Code section 3479 and 3480 (the general public nuisance statute) to motion picture theaters engaged in the business of exhibiting obscene films, and on November 1, 1976, this Court denied a petition for a writ of

certiorari in that case, Van de Kamp, as District Attorney v. Projection Room Theater et al., 428 U.S. 922.

Plaintiff's Complaint in Equity for an Injunction and To Abate a Public Nuisance was filed on Nov. 2, 1976, pursuant to Civil Procedure Code Section 731. (C.T. 2) The complaint alleged, in part, that commencing on or about Nov. 28, 1975, and repeatedly and continuously thereafter, up to and including the date of filing of the Complaint, the defendants exhibited at the Mitchell Brothers' Santa Ana Theater, 30 obscene motion picture films in 15 successive programs, identifying the films by name and the dates on or about which they were exhibited; that on Oct. 26, 1976, the City Council had acted by Resolution to revoke the theater's license and to declare the place a public nuisance and in violation of Ordinance NS 1325 and ordered the City Attorney to commence legal proceedings to abate the same by law and to obtain confirmation of the

revocation of license based upon the existence of a public nuisance; that unless restrained the defendants would continue to show the same and other such obscene films in the future. As a part of the prayer, plaintiff asked for a preliminary and final injunction and asked the Court to fix a time and place for a hearing on a preliminary injunction. (C.T. 2-28)

At the time of filing, plaintiff noticed a motion for a hearing on a preliminary injunction, set for December 9, 1976, in Dept. 26 at 9:00 A.M. (C.T. 29) and filed points and authorities in support thereof (C.T. 33-50). On Dec. 1, 1976, plaintiff obtained an order shortening time (C.T. 66) and served and filed a notice of motion to advance the hearing on the final injunction and to consolidate the same with the hearing on the application for a preliminary injunction, in anticipation that the defendants would object that plaintiff was not entitled to any relief on a motion for a preliminary

injunction. (C.T. 51-52).

On Dec. 9, 1976, the defendants requested a continuance on the grounds that they had not had an opportunity to examine the time and motion studies of the 26 motion picture films which were about to be filed with the Court on the motion for a preliminary injunction. The hearing on plaintiff's motion for a preliminary injunction and other motions was continued to Jan. 12, 1977, at 9:00 A.M. in Dept. 1, against the objections of plaintiff's counsel. On Dec. 13, 1976, 34 time and motion studies of the 17 programs exhibited at the theater from Nov. 28, 1975, through Dec. of 1976 were lodged with Dept. 1 for examination by defense counsel. Defense counsel Rhine informed the court by letter, dated Dec. 17, 1976, that such would be examined by his representative on Dec. 20, or 21, 1976 (C.T. 106A.)

On Jan. 12, 1977, a hearing was held on the defendants' demurrer and motion to strike portions of the complaint and on plaintiff's

motion for a preliminary injunction and to consolidate the final injunction with the preliminary injunction (C.T. 132). At such hearing, plaintiff contended that, in view of the subject matter which has been specifically pleaded in the complaint and the City Council's action therein, the people were entitled to an immediate hearing and court determination of the "public nuisance" issue and that the hearing should take the form of either (1) a trial on the motion for a preliminary injunction, in which case the relief afforded would be a judgment of interlocutory injunction (R.T. for Jan. 12, 1977 at 12 line 19-13 l. 20), or (2) a trial on a final injunction, after consolidation with the hearing on the preliminary injunction, in which event the relief afforded would be a final judgment of permanent injunction on the merits (C.T. 61-63, 65) (R.T. for Jan. 12, 1977 at 17 line 19-23). Before ruling on the motions of Law and Motion Dept. 23, Judge Oliver had his clerk call Dept. 1 to

determine the next available date for a priority case (R.T. for Jan. 12, 1977 at 69 line 19-24) and informed the parties that "on a priority case of this nature, you could get one as early as Feb. 1 or Mar. 8" (R.T. for Jan. 12, 1977 at line 6-8). When defense counsel Rhine advised the Court "my trial schedule would include a trial prior to three months from now. I just wanted to make the Court aware of that. As a matter of fact, it would probably be more likely early May" (R.T. for Jan. 12, 1977 at 70 Line 1-4), the Court noted: "Well, Counsel you may have to find somebody to take your place" (R.T. for Jan. 12, 1977 at 70 lines 7-8). Thereafter, the Court denied the motion to strike, overruled all demurrers, granted plaintiff's motion to consolidate the final injunction and the preliminary injunction and gave the defendants ten days to answer the complaint (C.T. 132). Upon transfer to Department 1 and objections of defense counsel on an immediate setting, the case was thereafter set

for a Trial Setting Conference on January 28, 1977 in Department 1 (C.T. 131).

On January 26, 1977, the defendants filed a Petition for Writ of Mandate in the Court of Appeal, entitled M.B.F.G. Theater Circuit Inc., et al. vs. Superior Court, 4 Civ. 17666 in which, at page 5, the defendants requested the Court to issue its peremptory writ of mandate commanding the Court to grant the demurrer or alternatively strike from the complaint all of the prayer for relief except paragraph 3(b).

On January 21, 1977 the defendants served and filed a "Motion To Stay All Proceedings In The Superior Court" until the Court of Appeal had an opportunity to act upon the above described petition for writ of Mandate in 4 Civ. 17666.

At the Trial Setting Conference on January 28, 1977, Judge Byron K. McMillan (Dept. 1) denied the Motion for Stay. Plaintiff asked for an early trial date on the ground that "People are alleging they are continuing

to show hard-core films and are profiting illegally while the matter is before the Court" (R.T. for January 28, 1977 at 4 lines 17-20). When Defense Attorney Rhine objected on the grounds that the defendants "would need at least three months to complete discovery in this case" (R.T. for Jan. 28, 1977 at lines 10-18), Judge McMillan set the trial for June 6th, 1977.

On Jan. 28, 1977, the defendants filed a verified answer (C.T. 162) and on Feb. 11, 1977, a verified amended answer (C.T. 169).

The defendants' petition for Writ of Mandate in M.B.F.G. Theater Circuit, Inc., v. Superior Court, 4 Civ. 17666 was denied by the Court of Appeal on February 11, 1977 without opinion.

On May 19, 1977, the defendants filed a second petition, being an original petition for Writ of Prohibition/or Mandate in the California Supreme Court, entitled Mitchell Brothers' Santa Ana Theater et al. v. Superior Court, L.A. 30783 which, at page 6, sought

the same relief as was sought in 4 Civ. 17666. On May 27, 1977 the California Supreme Court transferred the matter to the Court of Appeal. On June 3, 1977 that Court denied the petition in 4 Civ. 19033 without opinion.

On June 2, 1977, a stipulation entered into with certain of the defendants, was approved by the Court that the trial on June 6, 1977 would be bifurcated so that only the cause of action between the plaintiff, People of the State of California ex rel. Gow, City Attorney of the City of Santa Ana and the defendants, Mitchell Brothers' Santa Ana Theater, M.B.F.G. Theatre Circuit, Inc., Jim Gish, James Mitchell, Artie Mitchell, Demich, Inc. and Cinema 7, Inc., would be heard on June 6, 1977. (C.T. 242-244).

When the case was called for trial on June 6, 1977, defense attorney Rhine informed the Court that the Court of Appeal had denied its petition for a writ in 4 Civ. 19033 on June 3, 1977, and that a petition for stay

"is being filed this morning by my office in San Francisco" and asked that the case be put over to give the Court an opportunity to rule on the matter (R.T. for June 6, 1977 at 7 lines 8-16). Judge McMillan continued the case to August 1, 1977 over the objections of the Plaintiff that the defendants were making about $1200.00/a day and that it was about time that it should be stopped (R.T. for June 6, 1977 at 8, lines 21 thru 11 line 7).

On June 6, 1977, Judge McMillan in Dept. 1 granted the plaintiff's motion to file an amended complaint and granted the defendants 15 days to answer the same (C.T. 187). In its "First Amended and Supplemental Complaint in Equity for An Injunction And To Abate A Public Nuisance," plaintiff: (1) added the Mitchell Brothers Film Group, a Partnership, as a party; (2) identified the names of the films shown from and after the filing of the complaint up to April 1, 1977, the cut-off date established by the Court in Dept. 1 on January 28, 1977 for films which would be

included as a part of the subject matter of this action (R.T. for January 28, 1977 at 5 line 6) (C.T. 217-218) (3) pleaded factual obscenity specially, by attaching as exhibits 8½" x 11" photo-reduced copies of the time and motion studies of the 41 films named in the complaint[3/] and made the same a part thereof by reference (C.T. 220 at lines 5-18); and (4) amended the prayer to add the words and phrases "including compensatory damages and punitive damages in an amount to be determined by this Court for the willful, intentional, oppressive and malicious conduct of such defendants" after the words and phrases "and further relief as the Court may deem proper" (C.T. 224).

On June 8, 1977, the defendants filed a

3/ By letter dated August 7, 1981, petitioner has requested the Clerk of the Court of Appeal, pursuant to Rule 19 of the U.S. Supreme Court, to certify and transmit the following portions of the record to this Court: (1) First Amended and Supplemental Complaint in Equity For An Injunction And To Abate A Public Nuisance with Exhibits 1 thru 24 thereto, and (2) Plaintiff's trial exhibits 2A, 2B, 2C and 3 through 25 (time and motion studies of 24 programs).

petition for hearing in the California Supreme Court. On June 30, 1977, the Court filed its order denying the petition for hearing.

On July 2, 1977, the defendants filed a demurrer (C.T. 205) and a verified answer (C.T. 193) to the First Amended and Supplemental Complaint and renewed their motion to strike portions of the prayer of the First Amended Complaint (C.T. 199) and also moved to strike the time and motion studies which were pleaded by incorporation in the Complaint at paragraph 18, and noticed the same for August 1, 1977.

On August 1, 1977, a courtroom was not available. The Court continued the case to October 11, 1977, and stated that the matter would be allowed to trail on that date until a courtroom was available.

On August 16, 1977, Judge Rutter overruled the demurrer, denied the motion to strike the time and motion studies and sustained the plaintiff's claim that punitive damages was an issue, but struck the costs

of abatement and attorneys fees as special damages (R.T. for Aug. 16, 1977 at 51).

The trial began on October 11, 1977, and on October 17, 1977 the trial court determined that the pleadings set up mixed issues of law and equity, and that the case should proceed to a jury trial on the issues of "obscenity", "public nuisance", and "damages", as a matter of right, prior to the trial court's resolution of the equitable issues. (C.T. 328) (C/A.O.B. A14-A15). On October 25, 1977, the trial judge ordered the jury trial to be <u>further</u> bifurcated, to proceed first on the issue of "obscenity" and "public nuisance", to be followed thereafter on the issue of damages, if necessary to do so. (C.T. 352) (C/A.O.B. A-25).

The "liability" phase of the jury trial began on October 17, 1977 and ended on December 7, 1977. During that period the jury viewed 17 of the 41 feature length films which were alleged to be obscene (R.T. 727 et. seq.) (C/A.O.B. A-34 through A-41), and

considered real and testimonial evidence on the scope of the defendants James Mitchell and Artie Mitchell's motion picture operations during the period 1969-1977. (R.T. 843 et seq.). The Court first admitted, (R.T. 604) (C/A.O.B. A-22), then excluded real and testimonial evidence on the remaining 24 films. (C.T. 375-376) (C/A.O.B. A-41). Both James Mitchell and Artie Mitchell were called as witnesses by the plaintiff under C.C.P. section 776 (C/A.O.B. A-54 through A-72; A-77 through A-84; A-117 through A-137; A-142 through A-144) and pursuant to a court order and a subpoena duces tecum. By verdicts rendered on December 6, and 7, 1977, the jury found 11 of the 17 films to be "obscene" under a "beyond a reasonable doubt" burden of proof, and 4 of the 17 films "not obscene" under a "beyond a reasonable doubt" burden of proof, and was unable to reach a verdict on two films. They also returned a public nuisance verdict for the period that the 11 films were shown, under

a "preponderance of the evidence" burden of proof.

The "damages" phase of the trial commenced before the same jury on December 12, 1977 and ended on January 5, 1978. On January 5, 1977, the jury returned its verdicts in the amount of $76,400.00 compensatory damages. No punitive damages were awarded. (R.T. for Jan. 5th at 93). (C/A.O.B. A-289).

On January 5, 1978 the equitable issues stood submitted.

A "Judgment on Verdicts In Open Court" was filed on Jan. 6, 1978 (C.T. 470).

On June 6, 1978, the Court entered its "Findings of Fact and Conclusions of Law", "Judgment After Trial By Court", and "Amended Memorandum of Opinion on the Issues of: (1) Constructive Trust, (2) Revocation of Defendants' Business License, (3) Closure of Defendants' Theatre." (C.T. 1134-1220). In its judgment, the trial court denied the plaintiff's prayer to impose a constructive trust on the defendants' box office receipts,

denied the plaintiff's prayer to approve the action the City Council in Resolution 76-134 which revoked the defendants' licenses and permits, and granted the injunction, permanently enjoining the 11 motion picture films.

The Court, in the exercise of its independent judgment, found the 11 films to be obscene beyond a reasonable doubt and rejected the defendants' proposed counter - findings that four films were not obscene. (R.T. for May 2, 1978 at 5) (C/A.O.B. A-304). The Court also ordered the destruction of the 11 prints that were found obscene. (R.T. for May 2 at 44) (C/A.O.B. A-311). Although the plaintiff's motion to close the theater for one year was denied, on the ground that it was constitutionally impermissible, [4/] the

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4/ See Conclusion of Law XVI, infra, at pages C-29 and C-30 which reads:

> "Under the facts in this case; namely, that the Defendants are engaged in the commercial exploitation of obscene motion picture films and have for a substantial period of time in the past and as a continuing and regular
> (FOOTNOTE CONTINUED ON NEXT PAGE)

Court ordered the defendants to allow the City's officers "free and total access to all parts of the theater" for a two-year period for monitor purposes and ordered the deposit of a cash bond of $100,000.00 in trust[5/] for

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course of conduct exhibited sexually explicit films depicting oral copulation, sodomy, masturbation, homosexuality, lesbianism,group sex, portrayed incest, portrayed rape, the licking of sperm from the bodies of the actors and smearing of sperm on the face, and have admitted their intention to continue to show the same similarly sexually explicit films in the future, the abatement remedy of closing the defendants' theater for a period of time would otherwise constitute a proper and suitable equitable remedy except for the law expressed in People ex rel. Busch v. Projection Room Theater (1976), 17 Cal.3d 42, 58 that such closure is prohibited by the Constitution of the United States as a prior restraint."

5/ As to the reasonableness of the amount of the bond, the Court noted (R.T. for May 2, 1978 at 57A) (C/A.O.B. A-313):

THE COURT: All right. That will be noted, but I might say, while not used as supportive of this conclusion, it is a fact, . . . Artie Mitchell in response to this provision says, and I'll show you the newspaper article, . . . "it was no problem", that they "netted . . . close to . . . $400,000.00 during this period of time up at the theater, so that the hundred thousand dollars was no problem"; so that, is simply in response to your claim that you have to have a hundred thousand dollars. But as far as your constitutional argument, I don't see any real

the City of Santa Ana at the United California Bank in Santa Ana as a security deposit against future attorney fees, costs and expenses incurred by the City of Santa Ana in connection with any future public nuisance action filed subsequent to July 1, 1978, and required that said cash bond be maintained for two years.[6/] The Court denied the plaintiff's motion for an award of costs of abatement in the amount of $71,420.22 but allowed the City the recovery of $5869.31 in costs (R.T. for May 2, 1978 at 65 et seq.) (C/A.O.B. A-313).

Both parties appealed to the Court of Appeal, Fourth Appellate District. The defendants appealed and the City both appealed

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constitutional infringement there because it doesn't create any type of prior restraint whatsoever on you, and certainly there is no proposition of law that there can't be some burdens and some detriment involved in the exercise of First Amendment Rights."

6/ The equitable relief which was granted as an alternative to "closure" was predicated upon the trial judge's interpretation of this Court's previous rulings in obscenity public nuisance abatement litigation. See the opinion of Trial Judge Weeks, infra, at page B-61.

and cross-appealed from the "Judgment on Verdicts in Open Court." The defendants appealed and the City cross-appealed from those portions of the "Judgment After Trial By Court" which were adverse to the respective parties. [7]

In its opinion filed on Jan. 20, 1981,[8] the Court of Appeal reversed the "Judgment on Verdicts In Open Court" in its entirety (See opinion at A-35 - A-36) but refused to rule upon any of the errors which Plaintiff

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7/ In its appeal, the City raised the following federal questions:

> ". . . Whether the burden of proof on the equitable trial (injunction) should have been 'clear and convincing evidence' instead of beyond a reasonable doubt?" (C/A.O.B. 21).
>
> "Whether the trial court erred in its judgment in the third phase of the trial (Re: injunction) which refused to grant the remedy of abatement of the public nuisance by closure, and held that although, under the facts in this case, the abatement remedy of closure of the defendants' theater for a period of time would otherwise constitute a proper and suitable equitable remedy, such was barred by the law expressed in the Busch case that 'closure' is prohibited by the federal constitution as a prior restraint?" (C/A.O.B. 24 lines 9-13).

8/ A copy of the opinion appears herein at Appendix A-1 through A-36.

claimed had occurred during the jury trial phase and addressed itself only to the questions which were raised in relation to the "Equity" phase. The Court stated that injunctive relief against those movies found to be obscene was the only remedy which was permitted under this Court's decision in Vance v. Universal Amusement Co., Inc., 445 U.S. 308.

In its opinion dealing with the "Equity" phase of the trial, the Court affirmed those portions of the "Judgment After Trial By Court" which enjoined the defendants from advertising or exhibiting the eleven (11) films found by the trial court to be obscene beyond a reasonable doubt. The Court also upheld the trial judge's rulings which denied the City's requests for a constructive trust on the defendants' box office receipts, a revocation of the defendants' license, and the closure of defendants' theater for one year, but reversed those parts of the "Judgment After Trial By Court" which ordered access for the City's officers to all parts of

the defendants' theater for two years, the payment by the defendants of $100,000 into a trust fund for the City's future attorney fees, and the destruction of the prints of the eleven (11) films declared obscene, holding that injunctive relief was the only remedy which was permitted under this Court's decision in Vance v. Universal Amusement Co., Inc., 445 U.S. 308. The Court also held that "closure" of the theater "would result in a full and pervasive prior restraint upon the freedom of speech and of the press in violation of the First and Fourteenth Amendments to the United States Constitution" and that under this Court's decision Vance v. Universal Amusement Co., Inc., supra, the burden of proof in a civil public nuisance abatement action against films must be "beyond a reasonable doubt" and not "preponderance of the evidence."

On March 2, 1981 Plaintiff filed a Petition for Hearing in the California Supreme

Court [9] which was denied on May 13, 1981.

On May 18, 1981, the Court of Appeal filed its remittitur which included the following order: "Appellant, Mitchell Brothers to recover costs on appeal".

On June 1, 1981, the Defendants served Plaintiff with copies of: (1) "Notice of Motion and Motion for Return of Exhibits" with a hearing date of June 15, 1981 in Dept. 22 of Law and Motion, and (2) Memorandum of Costs and Disbursements. In such motions, the Defendants sought the return of the 17

9/ In its petition the City raised the same two federal questions which were raised in the Court of Appeal, (See pg. 28 at fn. 7) and the following additional federal question regarding the Court of Appeal decision:

> "Whether the decision of the Court of Appeal, by depriving the plaintiff, acting in his representative capacity as the authorized law officer of the City of Santa Ana, of all civil public nuisance abatement and equitable remedies except a personal injunction which can only be obtained: (1) after the exhibition of each obscene film and lengthy litigation; and (2) at great financial risk to the City and its officers and employees; and (3) at great costs of abatement to the City; and (4) without reimbursement from the person maintaining and profiting by such public nuisance, has deprived the plaintiff of a constitutionally adequate judicial remedy."

motion picture prints (including the 11 which were adjudged to be obscene), which the defendants had voluntarily produced and offered into evidence at the trial (see footnote 15, infra, at page 37), and costs of trial and on appeal, in the total amount of $29,082.84 (costs of trial: $21,745.39; costs on appeal: $7,337.45), on the grounds that the Defendants were the prevailing party and the judgment on the lawsuit was now final.

On June 3, 1981, Plaintiff filed a "Motion For Order Recalling the Remittitur" in the Court of Appeal, pending the filing of a timely petition for a writ of certiorari in the U.S. Supreme Court, which attached thereto as Exhibit "A" a copy of the above described pleadings and a supporting declaration. The motion for an order recalling the remittitur was denied by the Court of Appeal on June 9, 1981.

On June 11, 1981, Plaintiff served and filed a "Notice of Motion For Order To have Costs Taxed By The Court" with a supporting

declaration and points and authorities and set the same for a hearing on June 29, 1981.

On June 15, 1981, Plaintiff served and filed a "Motion For Order Recalling Remittitur Pursuant To California Rules of Court, Rule 26" (See Rule at Appendix F-18 et seq.) and a declaration and points and authorities in support thereof, for the purpose of correcting the remittitur to show the plaintiff also to be "deemed" a prevailing party under Rule 26, by virtue of its appeal from the "Judgment on Verdicts in Open Court" which had been reversed. On June 30, 1981, the Court of Appeal entered an order denying the motion.

On June 15, 1981, the Defendants' motion for return of the film exhibits was denied without prejudice, upon the plaintiff's representation that a timely petition for writ of certiorari would be filed in the U.S. Supreme Court.

On June 23, 1981, Plaintiff transmitted to this Court by mail an "Application To Stay the Enforcement of the California Court of

Appeal, Fourth District, Division 2, Judgment Sought To Be Reviewed on Certiorari", [10] alleging that Plaintiff was presently engaged in trial with the Defendants on the final injunction of the second and third public nuisance abatement lawsuits, [11] with the trial of the final injunction of the fourth public nuisance abatement lawsuit [12] trailing that trial in the same department, and alleging irreparable harm through return of the film exhibits and enforcement of the judgment

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10/ See People of the State of California ex rel. Gow v. Mitchell Brothers' Santa Ana Theater et al., October Term 1980, Application A-1071.

11/ See People of the State of California ex rel. Gow v. Mitchell Brothers' Santa Ana Theater et al., 101 Cal.App.3d 296, 161 Cal.Rptr. 562 (Jan. 22, 1980) in which the Court affirmed a preliminary injunction against 26 full length films in which 8 were viewed by the Court and the balance covered by a stipulation that the rest were substantially the same in nature and content as those viewed by the Court.

12/ See People of the State of California ex rel. Gow v. Mitchell Brothers' Santa Ana Theater et al., 118 Cal.App.3d 863, 173 Cal.Rptr. 476 (Apr. 16, 1981) in which the Court affirmed a preliminary injunction against 42 full length films and 8 previews in which the Court viewed 15 films and 8 previews and time and motion studies and continuities of the remaining 27.

in the first of such public nuisance abatement lawsuits. 13/

On June 26, 1981, Plaintiff transmitted to this Court by mail an amendment to Application A-1071, supra, alleging additional harm; namely, a ruling by Orange County Superior Court Judge Claude Owens on Thursday, June 25, 1981 in the trial of the final injunction in the second and third public nuisance abatement lawsuits, that the People are now collaterally estopped from asserting the obscenity of "Roller Babies" and "Summer of Laura" because the judgment in the first public nuisance abatement lawsuit is now final. On or about June 26, 1981, Justice Rehnquist denied the application for a

13/ See Appendix "G" to Application A-1071, being pages 45-52 of the deposition of James Mitchell which was stipulated into evidence as Exhibit 3 in the pending trial of the second and third public nuisance abatement lawsuits. In his deposition, James Mitchell admitted that the defendants specialize in hardcore films and, except for a three month period when they showed only "soft core" pornography, have shown nothing but hard-core pornography at the Santa Ana Theater for the entire period of 1975-1981 (5 years).

stay.[14/]

14/ In his ruling Judge Owens acknowledged that the reversal by the Court of Appeal of the "Judgment on Verdicts in Open Court" in People of the State of California ex rel. Keith Gow v. Mitchell Brothers' Santa Ana Theater et al., 114 Cal.App.3d 923, 171 Cal.Rptr. 85 at 94 was unqualified, see Bate v. Marsteller, 43 Cal.Rptr. 149 at 158, Hilton v. McNitt, 19 Cal.Rptr. 688 at 691, and set at large for readjudication all issues involved in the case, but ruled nevertheless that by having failed to permanently enjoin "Roller Babies" and "Summer of Laura" in his "Judgment After Trial By Court", see People of the State of California ex rel. Keith Gow v. Mitchell Brothers' Santa Ana Theater, et al., 114 Cal.App.3d 923, 171 Cal.Rptr. 85 at 88", Judge Weeks had inferentially "adjudicated" those films not to be obscene, for the purpose of the rule on collateral estoppel, citing Suki, Inc., v. Superior Court, 60 Cal.App.3d 616 at 630, 131 Cal.Rptr. 615 which held:

> ". . .If the People's position were to be upheld, there could never be a final judicial determination on the issue of obscenity in an obscenity prosecution unless the materials were found to be obscene at trial."

The trial of the final injunction in the second and third public nuisance abatement lawsuits (Nos. 28-12-14 and 29-91-82) was concluded on July 1, 1981 and on July 31, 1981 Judge Owens filed his "Memorandum of Intended Decision" (See copy of intended opinion at Appendix "L" herein), in which he held the remaining six films which had been admitted in evidence to be obscene. Judge Owens refused to confirm the Mitchell Brothers' license revocation by the City Council, holding a license revocation for cause to be as unconstitutional as a "judicial closure" after trial on the merits:

> "The net result of the license revocation is the same infringement of freedom of expression as was involved in Busch. The fact that a different agency of government has caused the

On July 20, 1981, Orange County Superior Court Judge Luis A. Cardenas ruled on Plaintiff's motion to tax costs and entered a minute order vacating the $5869.31 award of costs to Plaintiff for trial costs by Trial Judge Marvin Weeks, and taxing $16,200 costs of trial, submitted by the defendants, against the Plaintiff, but did not tax $7,077.26 of the costs of appeal (submitted by defendants (7337.45)). A copy of the Defendants' Memorandum of Costs and Disbursement [15/] and Judge Cardena's minute order appears hereinafter at Appendix J-9

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infringement in our case than in Busch is immaterial insofar as the violation of the Constitution is concerned. . . ."

15/ Item 6 of the Defendants' "Memorandum of Costs and Disbursements" reads as follows:

"6. Exhibits
Rental Fee: $16,200.00".

The 17 films (Defendants' Exhibits "A" thru "R") as to which a rental fee is claimed by the Defendants were voluntarily produced by the Defendants as an "accommodation to the defendants to show the films rather than . . . the time-motion studies" which had theretofore been admitted into evidence. (See remarks of Trial Judge Weeks at R.T. for Nov. 2, 1977 at page 9, lines 1-17 and C/A.O.B. at page A-34 thru A-36). Under the Court of Appeal's decision, 11 of the 17 films were obscene! (See Appendix A-35).

SUMMARY OF ARGUMENT

Introduction

The Santa Ana experience, with hard-core pornography being shown at the Mitchell Brothers' Santa Ana Theater for the past 5 years, represents a governmental problem which is facing all cities. During the past six months, the problem has escalated- the same pornographic movies are now being shown on subscription television.

The disagreement between the trial and appellate court as to how the public nuisance remedies can be applied after trial of the lawsuit is the result of this Court's not having squarely faced the problem since Huffman v. Pursue, Ltd. (1975) and Art Theater Guild, Inc. v. Ohio ex rel. Ewing (1975).

I

Vance v. Universal Amusement Co., Inc. is not apposite. Vance decided only the narrow question as to the judicial authority to grant a preliminary injunction "of indefinite duration prior to a trial on the merits". The

question here is what sanctions may be applied after a trial on the merits and a finding that a moral public nuisance presently exists.

There is a conflict between the decisions of the California Supreme Court and the Idaho Supreme Court as to whether "closure" may be applied under any circumstances. Since the Trial Judge herein held that, under this set of circumstances, he would have closed the theater if he could, this federal question is ripe for decision, under Rule 17(b) of this Court.

The record establishes the existence of a moral public nuisance and actual harm to the city's residents. Three years after the trial court's judgment, the city continues to suffer the same harm and the same problem, which "closure" of the theater would have solved.

"Closure" does not, by itself, constitute an unlawful prior restraint, for the reasons stated in Idaho ex rel. Kidwell v. U.S. Marketing, Inc. It may be imposed after a judicial determination made pursuant to con-

stitutionally acceptable procedures, as a penalty for past wrongful conduct for exhibiting obscenity as a regular course of business.

II

The Vance case does not require a burden of proof of "beyond a reasonable doubt". The reasoning of this Court in Addington v. Texas suggests that, at most, nothing more stringent than a "clear and convincing" standard of proof is required. The Court of Appeal's decision, that proof "beyond a reasonable doubt" is constitutionally required, is in conflict with this Court's decision in Mugler v. Kansas, which requires only a "clear and convincing" constitutional standard. Under Rule 17(c) of this Court, that federal question is ripe for decision.

III

Where moral harm is suffered, the law must provide an adequate remedy. An injunction against a specific film- the only remedy authorized by the Court of Appeal- is not an

adequate remedy under the record in this case.

The prolonged and unproductive litigation, which will result from this decision, is a benefit to the defendants and a detriment to the city. The defendants are subsidized by the box office receipts from the exhibitions of pornography. On the other hand, such litigation becomes financially impossible where the city is not permitted to recover damages or costs of abatement. Further, under Monell, Owen, and Fact Concerts, Inc., the risk of financial loss to the city and its employees, both in damages and attorney's fees, is real. In contrast, under the Civil Rights Act, the defendants are favored by their right to recover damages and attorney's fees (under a double standard which favors Civil Rights Plaintiffs).

By denying judicial remedies needed for suppression, the State Court has wrongfully given its sanction to a moral public nuisance.

Plaintiff has been denied rights under the Ninth, Tenth, and Fourteenth Amendments;

namely, the fundamental right to live in a community whose moral environment is free from the corrosive effects of obscenity; the right of a city to exercise its common law municipal authority to suppress a moral public nuisance within its boundaries for the benefit of its residents; the refusal to permit "closure" of the theater, or to uphold the $100,000.00 bond as judicial remedies, being contrary to this Court's holding in Art Theater Guild, Inc. v. Ohio ex rel. Ewing; the refusal to apply common law principles relating to the abatement of moral public nuisances, when required by state statute; and the irrational refusal to allow the tort remedy of damages in the case of a moral public nuisance, while allowing the same for a physical public nuisance.

REASONS FOR GRANTING THE WRIT

INTRODUCTION

For 5 years and 11 months (September 1975 - July 1981) the City of Santa Ana has been confronted with a major law enforcement

problem in the area of public morals. In September of 1975, a commercial business which produced, distributed and exhibited hard-core pornographic motion picture films on a national scale took over the lease of a neighborhood theater across the street from the Santa Ana Junior College and began showing three hard-core pornographic films which the operators themselves had produced and advertised as "hard-core": "Sodom and Gomorrah", "Resurrection of Eve" and "Behind the Green Door". Since September of 1975, those theater operators have continuously and uninterruptedly, from 11:00 A.M. to 11:00 P.M. and for seven days a week, exhibited nothing but hard-core pornographic films at that theater in the City of Santa Ana. The members of this Court know the quality of those films and what this confrontation is all about. The Mitchell Brothers' Film "Behind the Green Door" has already been before this Court in Ballew v. Georgia, 435 U.S. 223, (1978). See also, the time and motion studies of such films at

Appendix "G", "H", and "I" to this petition.

Remembering the commands of this Court against "prior restraint", expressed in Freedman v. Maryland, 380 U.S. 51, (1965); Southeastern Promotions Ltd. v. Conrad, 420 U.S. 546, (1975) and a host of other federal decisions, and acting pursuant to the authority of an ancient common law principle which has heretofore been regarded as "sound" in the area of public nuisance law, (See Point III(E) infra, at page 64) and recently reaffirmed in People of the State of California ex rel. Busch v. Projection Room Theater et al., 17 Cal.3d 42, [16/] the Santa Ana City Council decided to proceed under the civil law and the basic authorization of the California public nuisance statute.

16/ In People of the State of California ex rel. Busch v. Projection Room Theater et al., 17 Cal.3d 42, 130 Cal.Rptr. 328 (June 1, 1976), petition for certiorari denied in Van de Kamp, as District Attorney v. Projection Room Theater et al., No. 76-540, 428 U.S. 922, 50 L.Ed.2d 289, 97 S.Ct. 320 (Nov. 1, 1976), the California Supreme Court overruled the defendants' demurrer and held that the California public nuisance statute did provide the authority for a civil lawsuit against the exhibition of obscene motion picture films.

The Santa Ana experience during the past 5 years, 11 months, described at length in the Statement of the Case herein, is a microcosm of a governmental problem which is perplexing other City Councils and City Attorneys thoughout this nation. That problem - the intrusion of hard-core pornography into the lifestyle of the national community-is not an event which can be brushed under the rug. As noted by Judge Weeks in his opinion (See Appendix at B-45), the defendant James Mitchell testified that he expected to see films like "Behind the Green Door", found by the jury herein to be obscene, to be appearing on television within the near future. That expectation has already born fruit. During the trial of the second and third public nuisance abatement lawsuits, referred to in the Statement of Facts at footnotes 11, 13, and 14 on pp. 34-36, the City's investigator testified that he had seen four of the films, which he had previously surveilled at the Mitchell Brothers' Santa Ana Theater, exhibited on

"ON" television in Los Angeles County during the past six months. A copy of the reporter's transcript of the testimony in Case No. 29-91-83 on June 30, 1981 appears at Appendix "M" to this petition. See also, Los Angeles Times news article of May 29, 1981, entitled "X Films on Small Screen A Big Issue".

The present uncertainty in public nuisance law, exemplified in the conflict between the rulings of Trial Judge Weeks and the Court of Appeal below, is the result of this Court's not having squarely faced the obscenity nuisance abatement problem since its decisions during the 1974 October Term in Huffman v. Pursue, Ltd., 420 U.S. 592, (1975), and Art Theater Guild, Inc. et al. v. Ewing, 421 U.S. 923, (1975), appeal dismissed for want of a substantial federal question. Unless this Court settles the substantial federal questions which are raised in the petition herein, such uncertainty will continue, and the City's ability to effectively resolve its public nuisance abatement

problem will be seriously impaired.

The Court of Appeal erred when it held Vance v. Universal Amusement Co., Inc., 455 U.S. 308, (1978) to be controlling and overruled the remedies which had been applied by Trial Judge Weeks after a trial on the merits. The Vance decision is inapposite and decided only the narrow question as to the judicial authority of Texas Courts under the Texas Statutes to grant a preliminary injunction "of indefinite duration on the exhibition of motion pictures prior to a trial on the merits." (our emphasis) There was no preliminary injunction issued in the Santa Ana case. At the beginning of the lawsuit, Law and Motion Judge Oliver granted Plaintiff's motion to consolidate the hearing on the preliminary injunction with the hearing on the final injunction (See Statement of Facts supra, at page 15), and the trial was thereafter had on the merits. At the conclusion of the trial on the merits, plaintiff requested that the premises be closed because of the notorious

nature of the defendants' unlawful past conduct, which had been spread upon the trial record.

Petitioner submits that the recent unanimous decision of the Idaho Supreme Court in Idaho ex rel. Wayne Kidwell v. U.S. Marketing, Inc., (See copy at Appendix "K" to this petition) which holds, contrary to the ruling of Trial Judge Weeks herein and the California Supreme Court in People ex rel. Busch v. Projection Room Theater et al., 17 Cal.3d 42, that closure of a theater after a trial on the merits "does not by itself constitute an unlawful prior restraint upon the exercise of free speech", (See Appendix K-27 et seq.) makes this federal question one which is ripe for consideration in this petition for certiorari. See Rule 17(b) of the U.S. Supreme Court.

I

THE COURT OF APPEAL ERRED IN UPHOLDING TRIAL JUDGE WEEK'S CONCLUSION OF LAW XVI. CLOSURE OF THE MITCHELL BROTHERS' SANTA ANA THEATER IS NOT PROHIBITED BY THE UNITED STATES CONSTITUTION AS A PRIOR RESTRAINT AFTER A TRIAL ON THE MERITS AND CONCLUSIVE PROOF AS TO THE NATURE OF THE MORAL PUBLIC NUISANCE.

Trial Judge Marvin Week's ruling on closure in Conclusion of Law XVI (See footnote 4 on page 25 supra) was drawn from a background of sordid facts (See Findings of Fact XVI, XVII, XVIII and XIX at Appendix C-16 thru C-19 herein). It is clear from Judge Week's opinion that he would have closed the theater upon the conclusion of the trial on the merits except for the fact he believed that, under the federal constitution, he had no power to do so under any set of circumstances. See Judge Week's opinion, filed June 6, 1978, at Appendix B-61 herein:

> "Basing its decision then on the Busch case, supra, and the host of authorities cited therein, this Court must reluctantly deny plaintiffs the ultimate relief sought; to-wit: Closure of defendants' theatre for one year, and turn to some other means of giving full recognition to the jury's determinations which this Court considers as the voice of the majority of the moral and decent citizens in the County of Orange, in addition to this Court's independent determinations based on the totality of all the evidence and circumstances herein."

Actual harm to Plaintiff from the asserted constitutional error is clear (See Finding

of Fact No. XIX at Appendix C-18). Had the theater been closed, the City of Santa Ana would not now be presented with the problem it still confronts, three years after the final judgment was entered in the lawsuit. (See Statement of Facts, supra, at pages 31-37)

The roadblock which Trial Judge Weeks faced was the dictum in People ex rel Busch et al. v. Projection Room Theater et al., 17 Cal.3d 42, 58, 130 Cal.Rptr. 328, 337 that "to grant the relief sought by plaintiffs (i.e., closing down the premises in question) would result in a full and pervasive prior restraint upon the freedom of speech and of the press in violation of the First and Fourteenth Amendments to the United States Constitution." That this language of the majority opinion in Busch was dictum, is established from an examination of the concurring and dissenting opinion of Associate Justice Clark at page 62 reading:

"I concur in the judgment and the opinion of the court except insofar as the new opinion differs from the vacated opinion by substitution of the material at page 337 to page 338 of 130 Cal.Rptr., at page 600 to page 610 of 550 P.2d in place of the following paragraph: 'We express no opinion upon the further question whether the court may, in addition, either close the premises entirely or enjoin further "obscene" exhibitions regarding materials not yet adjudged obscene. Several cases suggest that such further forms of relief would be appropriate and constitutionally permissible. (See People ex rel. Hicks v. Sarong Gals (1974) 42 Cal.App.3d 556, 562-563, 117 Cal.Rptr. 24; Bloss v. Paris Township (1968) 380 Mich. 466) 157 N.W.2d 260; Grove Press, Inc. v. Flask (N.D.Ohio 1970) 326 F.Supp. 574, 578-580; Oregon Bookmark Corporation v. Schrunk (D.Or.1970) 321 F.Supp.639; State ex rel. Cahalan v. Diversified Theat. (1975) 59 Mich.App. 223) 229 N.-W.2d 389, 396-397; United Theaters of Fla., Inc. v. State ex rel. Gerstein (Fla.App.1972) 259 So.2d 210, 212-213, vacated and remanded, 419 U.S. 1028, 95 S.Ct. 510, 42 L.Ed.2d 304.) Other cases have held that such relief would constitute an invalid prior restraint of presumptively protected materials (Gulf States Theatres of La., Inc. v. Richardson (La.1973) 287 So.2d 480, 489; Mitchem v. State ex rel. Schaub (Fla.1971) 250 So.2d 883, 886-887; New Riviera Arts Theatre v. State (1967) 219 Tenn.652) 412 S.W.2d 890, 893-895; Sanders v. State (1974) 231 Ga. 608) 203 S.Ed.2d 153, 156-157; State ex rel. Little Beaver Theatre, Inc. v. Tobin (Fla.App.1972) 258 So.2d 30, 32; State ex rel. Ewing v. 'Without A Stitch' (1974) 37 Ohio St.2d 95) 307 N.E.2d 911, 917-918.)

> Since the United States Supreme Court has not yet spoken on this difficult question, and since in this posture of the case the issue is not before us, we leave the question open for further consideration." (Our emphasis.)

The issue presented herein has not previously been before this Court. The question of closure was presented to the trial judge after a trial on the merits, in which the proof conclusively shows that obscene motion picture films were shown continuously and as a regular course of business, at which time the trial judge ruled that, were he permitted to close the theater under the federal constitution, he would have done so. Petitioner submits that, on these facts, the law is as was stated by the Idaho Supreme Court in Idaho ex rel. Kidwell, supra, and for the reasons therein given: (See Appendix K-27 et seq.):

> "We therefore conclude that, under the circumstances of this case, - one-year closure of forfeiture order does not by itself constitute an unlawful prior restraint upon the exercise of free speech. Our conclusion is based on the following: the extensive power of the state to impose a forfeiture on

neutral and innocent property used in the commission of forbidden acts; the power of the state to impose sanctions of its choice upon those who disseminate unprotected obscenity; the fact that the forfeiture or closure order is not directed at any speech or publicaction, but is instead aimed at the real property apart from the content of expression contained therein; and the fact that the defendants remain free to disseminate any materials, except those already determined to be obscene, at any other location, subject of course to further penal actions by the state should the defendants again violate laws regulating obscenity. Again, our conclusion is premised on the fact that, as shown by the record below, the one-year closure would be imposed only after a judicial determination of obscenity made pursuant to constitutionally acceptable procedures."

II

THE COURT OF APPEAL'S CONCLUSION THAT VANCE V. UNIVERSAL AMUSEMENT CO., INC., REQUIRES A BURDEN OF PROOF OF "BEYOND A REASONABLE DOUBT" AS A CONSTITUTIONAL STANDARD IN CIVIL PUBLIC NUISANCE ABATEMENT CASES (OBSCENITY) IS IN CONFLICT WITH AN APPLICABLE DECISION OF THIS COURT.

The Court of Appeal's opinion infers from the majority per curiam opinion in Vance v. Universal Amusement Co., Inc., supra, that, as a constitutional standard, the burden of proof in civil public nuisance abatement

cases has been changed from "preponderance of the evidence" to "beyond a reasonable doubt" See Court of Appeal's opinion at Appendix A-28 herein:

> "As we noted earlier, the Supreme Court has recognized that 'more narrowly drawn procedures' are required when the nuisance to be abated is the exhibition of obscene films. (Vance v. Universal Amusement Co., Inc., supra, 100 S.Ct. at p. 1160-1161). We conclude that one of the required procedures is that obscenity be proved beyond a reasonable doubt." (Our emphasis.)

The error in the Court's logic is, as was noted in the Introduction at page 47, supra, there is no logical "nexus" between the Vance trial facts and the trial facts herein. The Vance majority opinion dealt with the narrow question as to the judicial authority to grant a preliminary injunction "of indefinite duration on the exhibition of motion pictures that have not been finally adjudicated to be obscene" and the Texas preliminary injunction procedures, Vance at 420, and not with the "procedures" involved in the final trial on the merits.

The single apposite authority relied upon by the Court of Appeal, is the concurring opinion of Associate Justice Brennan in McKinney v. Alabama, 424 U.S. 669, 678, in which only Justices Marshall and Stewart concurred. Their ruling that a majority of this Court will change the constitutional standard for the burden of proof in civil public nuisance abatement cases from the "clear and convincing standard" established by this Court in Mugler v. Kansas (1887), 123 U.S. 623, where forfeiture of property was an issue, is mere conjecture.

From the reasoning employed by this Court in Addington v. Texas, 441 U.S. 418, (1979), it seems clear that, from a constitutional standpoint, in a civil case of this nature, the due process guarantees of the Fourteenth Amendment require, at the most, nothing more stringent than a "clear and convincing" standard of proof.

Because the California Court of Appeal has decided this federal question in a way

which is in conflict with an applicable decision of this Court (Mugler v. Kansas, 123 U.S. 623), under the guidelines established by this Court, the federal question is ripe for consideration in this petition for certiorari. The California decision is certain to lead other courts astray and to create legal confusion as to the "burden of proof" in civil cases. This important question of federal law should be settled by this Court now. See Rule 17(c) of the Rules of the U.S. Supreme Court.

III

IN CONSTRUING VANCE v. UNIVERSAL AMUSEMENT, CO., INC., TO PRECLUDE ALL CIVIL PUBLIC NUISANCE AND ABATEMENT REMEDIES EXCEPT A PERSONAL INJUNCTION AGAINST A SPECIFIC FILM, THE COURT OF APPEAL HAS WRONGFULLY GIVEN ITS SANCTION TO A MORAL PUBLIC NUISANCE. BY DENYING THE JUDICIAL REMEDIES WHICH ARE NECESSARY FOR SUPPRESSION, THE COURT HAS DEPRIVED THE PLAINTIFF OF FEDERAL RIGHTS UNDER THE 9TH, 10TH, AND 14TH AMENDMENTS TO THE U.S. CONSTITUTION.

The record herein clearly establishes a moral public nuisance and a "serious wrong

(harm)" [18] for which the law must provide an adequate remedy. [19]

As applied to the trial facts herein, the single right to a personal injunction against a specific obscene film which the Court of Appeal authorizes, is an illusion and fails to provide an adequate remedy. See footnote 20, infra at p. 59. The Mitchell Brothers business practice is to show 2

18/ See Findings of Fact XVII, XVIII, and XIX, at Appendix C-17 and C-18; Conclusion of Law IV at Appendix C-23, Conclusion of Law XVI at Appendix C-29, and Judge Week's opinion at Appendix B-48 through B-54.

19/ California Civil Code Section 3523 provides: "For every wrong there is a remedy." See, also, James Phalen v. Commonwealth of Virginia, 12 L.Ed. 1030, 1033 (1850):

> "The suppression of nuisances injurious to public health or morality is among the most important duties of government. . . . It is a principle of the common law, that the king cannot sanction a nuisance."

It is a fundamental rule of the common law that "the Courts are the guardians of the public morals," Sir Charles Sedley's Case, 1 SID 168; Rex v. Curl, 2 Strange 789 (1727). The power of Courts of Equity, in regard to public nuisances, transcends that of Courts of Law and "is a salutary jurisdiction, especially where a nuisance affects the health, morals, or safety of the community." Mugler v. Kansas, 123 U.S. 205 at 214 (Dec. 5, 1887).

pornographic films on a program and change the program each week. In 5 years, the theater has exhibited approximately 500 different pornographic titles. The short run of each film and the theater's ability to shorten that run even further, coupled with the practical problem of Plaintiff's not being able to force the defendants to an early trial on the merits in such cases, (See Statement of Facts at pages 13, 15, 16, 17, 19, and 21) makes the personal injunction against a specific film worthless, especially where the film itself must be given back at the conclusion of the lawsuit, and it can be expected that each of such lawsuits will be tenaciously resisted, that the City's costs of abatement will be substantial, and that the costs may not be recovered by the Plaintiff in such lawsuit either as costs of abatement or damages or attorney's fees. On the other hand, the defendants benefit from such prolonged and unproductive litigation, in that the substantial profits being

derived from the box office of the moral public nuisance, ($1200.00 per day, See Statement of Facts at pages 19, 26 fn. 5, and Appendix C-18) provide the defendants with a slush fund which more than underwrites their costs of litigation and allows a substantial profit, whereas the budgetary problems of Cities today make such prolonged and unproductive litigation unattractive.[20/] Further, this Court's recent decisions in Monell v. New York City Department of Social

20/ The cost to the City of Santa Ana for the first public nuisance abatement lawsuit was $71,420.20 (See Statement of Facts at page 30). Further, in post judgment proceedings, the Orange County Superior Court has construed the Court of Appeal's opinion and remittitur, which included the order "Appellant Mitchell Brothers to recover costs on appeal." (Statement of Facts at page 31), to make the defendants Mitchell Brothers' the prevailing party at trial, has vacated the costs of $5869.31 which were awarded plaintiff in the trial court judgment filed on June 6, 1978, (See Appendix D-11), and has assessed $16,200.00 in trial costs against the plaintiff for "film rentals" of the very films upon which Judge Weeks had based his findings of harm to the City and his assessment that the theater should be closed! Because the Court of Appeals holds that the films which were found to be obscene cannot be destroyed, the defendants have already moved for the return of such films, (See Statement of Facts at page 31).

Services, 436 U.S. 658, (1978); Owen v. City of Independence, 445 U.S. 622, (1980); and City of Newport v. Fact Concerts, Inc., ___ U.S. ___, 68 L.Ed.2d ___, 101 S.Ct. ___, 41 CCH at B3944 (June 26, 1981), which have increased municipal liability, make the risk of financial loss to the City and its officers and employees real and substantial without a corresponding risk to the defendants who, under 42 U.S.C. section 1983 and 1988 may recover Civil Rights damages and attorneys fees under a double standard which favors the Civil Rights Plaintiff, Entertainment Concepts Inc. v. Maciejewski, 631 F.2d 497 (7th Cir. (1980), cert.den. in Maciejewski v. Entertainment Concepts, Inc., ___ U.S. ___, 67 L.Ed.2d 346, (Feb. 23, 1981). See also, Supreme Court of Virginia v. Consumers Union of the U.S., 446 U.S. 719 at 737 n.17, (1980).

By denying the judicial remedies which are necessary for suppression, the Court itself wrongfully has given its sanction

to a moral public nuisance. See James Phalen v. Commonwealth of Virginia, supra.

The denial of the sanctions necessary for suppression deprives the plaintiff as the authorized law officer representing the residents of the City of Santa Ana of federal rights under the 9th, 10th, and 14th Amendments to the U.S. Constitution, and for the following reasons:

(A) The lack of an adequate judicial remedy deprives the Citizens of the City of Santa Ana of one of the fundamental rights essential to the concept of well-ordered liberty; namely, the right to live in a community whose moral environment is free from the degrading and corrupting influences of the commercial exploitation of hard-core pornography. See Jacobellis v. Ohio, 378 U.S. 184 at 199 (1964), (Warren, C.J. dissenting), and Paris Adult Theater I v. Slaton, 413 U.S. 49, 59, (1973), (Burger, C.J.).

(B) The refusal to authorize an adequate judicial remedy, i.e., apply the judicial

remedy of "closures" as authorized in the State of Idaho, see State of Idaho ex rel. Kidwell, supra, deprives the City of Santa Ana of the fundamental right of a City to exercise its common law municipal authority (police power) to suppress a moral public nuisance within its boundaries for the benefit of its residents. See Government Code sections 38771, 38773, and 38773.5; Douglas v. Kentucky, 168 U.S. 489 at 505 (1897); H.G. Wood, "The Law of Nuisances," sections 23 and 24 at pages 45-46; section 32 at page 53; section 57 at page 77, section 65 at page 85; and section 743 at page 972: Joyce, "Laws of Nuisances," Section 345 at 498 and 507; James Phalen v. Commonwealth of Virginia, 12 L.Ed. 1030, 1033. 62 C.J.S. section 184 at pp. 342-343; McQuillin Municipal Corp., (3d Ed.) vol. 2, section 4.82 and 4.83, pgs. 137-149; Hamling v. U.S., 418 U.S. 87, (1974).

(C) The refusal to uphold the $100,000.00 bond which Trial Judge Weeks approved as an alternative to closure, (See Statement

of Facts at page 27, footnote 6), deprived plaintiff of an effective equitable remedy, applied in the State of Ohio and approved by this Court. See Ohio ex rel. Ewing v. "Without A Stitch," 37 Ohio St.2d 95, (1974), Appeal dismissed for want of a substantial federal question in Art Theater Guild, Inc. v. Ohio ex rel. Ewing, 421 U.S. 923, (1975)

(D) In People et al. v. City of Los Angeles, 160 Cal.App.2d 494 (May 15, 1958), petition for hearing in the California Supreme Court denied on July 11, 1958, it was held that, under C.C.P., section 731, the City Attorneys of Manhattan Beach and Hermosa Beach could recover damages suffered by the inhabitants of those cities from a physical public nuisance being maintained by the City of Los Angeles (pollution of waters through discharge of sewage into Santa Monica Bay). The refusal of the Court of Appeal to allow the same public nuisance tort remedy to the citizens of the City of Santa Ana in the case of a moral public nuisance is irrational and in

derogation of its common law duty to suppress moral nuisances. (See Point III(E), infra).

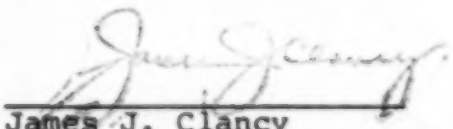
(E) Under the common law of England, lewd conduct and obscenity were common law crimes and common law (moral) public nuisances. Those concepts were absorbed into the early American common law and translated into statutory law via the N.Y. Field Code in 1848, which codified the common law public nuisance concept. California adopted its present public nuisance statute (Civil Code section 3479) in 1872, based upon the Field Code, see Pleading and Procedure, Louisell and Hazard Jr., 2nd edition at 36-37, and that statute remains unchanged to this date. In Busch, supra, the California Supreme Court reaffirmed the fact that Civil Code section 3479 embraced both moral and physical nuisances. Civil Code sections 5 and 22.2, (See Appendix F-1) require California Courts to interpret the public nuisance statute as a continuation of the common law and require California Courts to follow the law on public nuisances

as developed under the common law. The court below failed to apply common law principles as required by statute. (See III(b) on page 62.)

Conclusion

During the past 6 years, the City of Santa Ana has expended in excess of $170,000 on 4 public nuisance abatement lawsuits. (See Santa Ana Register news article, dated August 2, 1981, at Appendix "N" to this petition, reporting on the status of this 6 year controversy.) In the first lawsuit, the trial judge ruled that, upon the trial record before him, he would have closed the theater if he could do so under the U.S. Constitution. The question of "closure" has never been asked in this context, and it is ripe for review under Rule 17(b). The Court should grant this petition and decide the "closure" issue and the two remaining federal questions presented herein.

DATED: Aug. 7, 1981 Respectfully submitted,



James J. Clancy
Attorney for Petitioner.

CERTIFICATE OF SERVICE

I, hereby certify that on this 8th day of August 1981, the original and 40 copies of the within Petition for Writ of Certiorari were deposited in the United States Post Office in Sun Valley, California, with first-class postage prepaid, and properly addressed to the Clerk of the United States Supreme Court.

I further certify that three (3) copies were also mailed, postage prepaid, to the below listed parties to the proceedings and that all parties required to be served have been served.

LAW OFFICE OF WILLIAM K. MAAS, JR.
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Attorney for Petitioner.

APPENDIX A

(Reference: Petition at pg. 2, 28, fn. 8 54.)

Opinion of the Court of Appeal, Fourth Appeliate District, Division 2, in People of the State of California ex rel. Gow, City Attorney of the City of Santa Ana, Calif. v. Mitchell Brothers' Santa Ana Theater et al., 114 Cal.App.3d 923, 171 Cal.Rptr. 85 (Jan 20, 1981)

.....A-1 Thru A-36

PEOPLE of the State of California ex rel. Keith GOW, City Attorney of the City of Santa Ana, California, Plaintiffs and Appellants,

v.

MITCHELL BROTHERS SANTA ANA THEATER et al., Defendants and Appellants.

Civ. 19940.

Court of Appeal, Fourth District, Division 2.

Jan. 20, 1981.

Joseph Rhine, Hollywod, Wiliam K. Maas, Jr., Martinez, and Robert Thorp, San Francisco, for defendants and appellants.

James J. Clancy, Sun Valley, for plaintiffs and appellants.

MORRIS, Associate Justice.

The plaintiff and the defendants appeal following a trial to determine whether the showing of allegedly obscene films by the defendant constituted a public nuisance The case was tried in part by a jury and in part to the court. Judgments were entered finding certain of defendants'

films obscene and granting part of the relief requested by plaintiff.

Facts

Pursuant to Code of Civil Procedure section 731, [1] the Santa Ana City Attorney ("City") brought an action against the owners and operators of the Mitchell Brothers' Santa Ana Theater ("defendants") to abate a public nuisance. The City's Complaint listed numerous films shown by the defendants between November 28, 1975 and March 30, 1977, all of which were alleged

1. Code of Civil Procedure section 731 reads, in pertinent part:

> "An action may be brought by any person whose property is injuriously affected, or whose personal enjoyment is lessened by a nuisance, as the same is defined in section thirty-four hundred and seventy-nine fo the Civil Code- and by the judgment in such action the nuisance may be enjoined or abated as well as damages recovered therefor. A civil action may be brought in the name of the people of the State of California to abate a public nuisance, as the same is defined in section thirty-four hundred and eighty of the Civil Code, . . . by the city attorney of any town or city in which such nuisance exists. . ."

to obscene. It was alleged that the showing of these films constituted a public nuisance as defined by Civil Code sections 3479 and 3480.[2] The City sought the following relief: that the court approve a resolution passed by the Santa Ana City Council revoking all of the defendants' operating licenses and permits; that the defendants be permanently enjoined from showing the named films; that the named films be destroyed by the State; that the box office receipts from the showing of the

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2. Civil Code section 3479 reads:

"Anything which is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life of property, or unlawfully obstructs the free passage or bay, stream, canal, or basin, or any public park, square, street, or highway, is a nuisance."

Civil Code section 3480 reads:

"A public nuisance is one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal."

films be forfeited; that the defendants' theater be closed for one year; that the theater's fixtures and movable property be removed by the police and sold; that the plaintiff receive compensatory and punitive damages, and that the plaintiff recover costs and attorney's fees.

The court ruled that the issues of obscenity, public nuisance, and damages would be decided by a jury prior to the court's resolution of the equitable remedies issues. The court reasoned that since all relief sought by the City was dependent on a prior finding of obscenity and nuisance, a "prior resolution of the equitable issues would require a judicial determination of the issues of 'obscenity' and 'public nuisance' and would thus deprive defendants of a full and meaningful jury trial on the issue of damages." The jury trial itself was bifurcated. The jury first decided the issues

of obscenity and public nuisance and then determined the amount of damages recoverable.

During the obscenity and public nuisance phase of the trial, the jury viewed 17 films at the defendants' theater.[3] The jury also heard extensive testimony from both lay and expert witnesses. After all the evidence had been presented, the jury was read over 50 separate instructions. Included in the instructions was the requirement that a film could be found obscene only if the jurors were convinced of such "beyond a reasonable doubt". The jury found 11 films

3. The City's complaint sought relief against 41 films, but only the 17 films that were viewed were within the control of the defendant. The City sought to enter into evidence still photographs of portions of all 41 films, which were termed "time and motion studies". The court denied the motion as to the 17 films under the Best Evidence Rule (Evid.Code, § 1500). The "time and motion studies" for the other 24 films were first admitted, but were later excluded from evidence as unduly prejudicial under Evidence Code section 352.

obscene, 4 not obscene and could not reach a verdict on the remaining two.

After further presentation of evidence during the damages phase of the trial, the jury was instructed on the issues of nominal, compensatory and punitive damages. The jury awarded a total of $76,400 in compensatory damages and awarded no punitive damages.

Thereafter, the court issued its judgment and findings of fact and conclusions of law on the equitable issues. The court ruled in favor of the defendants on the issues of a constructive trust on the theater's box office receipts, the revocation of defendants' license, and the closing of the theater for one year. In the City's favor, the court permanently enjoined the exhibition or advertising by the defendants of the same 11 films which had been found obscene by the jury; ordered

the defendants to allow the City's officers "free and total access to all parts of the theatre" for a two-year period for monitoring purposes; ordered the defendants to deposit $100,000 "in trust for the City . . . as a security deposit against future attorney fees, costs, and expenses incurred by the City" in abating future nuisances by the defendants within a two-year period; ordered the destruction of the 11 "motion picture film prints" that were found obscene; and awarded the City the recovery of $5,869.31 in costs.

In total, five notices of appeal were filed. The defendants appealed and the City both appealed and cross-appealed "from the jury verdicts" on the issues of obscenity and damages.[4]

4. This court has no power to hear an appeal from a jury verdict, as such is not appealable, (Code Civ.Proc., § 904.1.) However, since there was filed a "Judgment on Verdicts in Open Court", we will treat the appeals as being from that judgment. (Jackson v. Lovas (1951) 106 Cal.App.2d 426,

(Footnote Continued On Next Page.)

Additionally, the City and the defendants appealed from those portions of the "Judgment After Trial By Court" that were adverse to them. The errors asserted by the parties are two numerous to summarize at this point.[5] They will be dealt with at the appropriate parts of our discussion.

Obscenity as a Public Nuisance

427, 235 P.2d 232; see also In re Edgar M. (1975) 14 Cal.3d 727, 740, 122 Cal.Rptr. 574, 537 P.2d 406; A. L. Castle, Inc. v. County of San Benito (1964) 227 Cal.App.2d 602, 603-605, 38 Cal.Rptr. 855; but see Estate of Roberson (1952) 114 Cal.App.2d 267, 250 P.2d 179, where this court expressed the fear that allowing an appeal in a case such as the present one "would open the door to all manner of abuses." Such concern has subsequently been proved unfounded.)

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5. Some mention of the City's opening brief is necessary. Rarely has there such a total disregard for that section of Rule 13 of the Rules of Court which requires the statement of the case to be "(set) forth concisely." The "brief" spans 272 pages (at 36 lines to the page) and is supplemented by a 317-page "Expanded Statement of Facts." While such a large document is occasionally helpful (Conaway v. Yolo Water & Power Co. (1928) 204 Cal. 125, 127, 266 P. 944), most often, as here, it is not. (King v. Gildersleeve (1889) 79 Cal. 504, 507-508, 21 P. 961; Couts v. O'Neill (1921) 51 Cal.App. 152, 158, 196 P. 109.)

Obscenity as a Public Nuisance

The defendants spend considerable time arguing that the use of equitable remedies in a civil action to abate a public nuisance is not a valid method of regulating obscenity. Although the California Supreme Court has expressly ruled contrary to this position (People ex rel. Busch v. Projection Room Theater (1976) 17 Cal.3d 42, 130 Cal.Rptr. 328, 550 P.2d 600, cert. den. sub nom., Van de Kamp v. Projection Room Theater, 429 U.S. 922, 97 S.Ct. 320, 50 L.Ed.2d 289), the defendants criticize the ruling as "imprudent" and ask us nevertheless to uphold their argument. This we cannot do. Few principles of law are more basic than that courts are bound by the decisions of those other courts which exercise superior jurisdiction. (Auto Equity Sales, Inc. v. Superior Court (1962) 57 Cal.2d 450, 455,

20 Cal.Rptr. 321, 369 P.2d 937.) Since Busch holds that a state may regulate the exhibition of obscene matter by application of public nuisance statutes (17 Cal.3d at p. 55, 130 Cal.Rptr. 328, 550 P.2d 600), we must conclude that the present action was properly brought.[6]

Busch, however, dealt only with a trial court's judgment sustaining a demurrer without leave to amend. And, since no reported case in this state has yet reviewed a final judgment following a full trial in a Busch-type lawsuit, many issues regarding trial procedures and remedies in

6. Additionally, we note that the use of other types of civil proceedings to regulate obscenity in this state has been held valid. In People v. E.W.A.P., Inc. (1980) 106 Cal.App.3d 315, 165 Cal.Rptr. 73, hg. den. on Aug. 21, 1980, the court approved the application of Business and Professions Code section 17200 et seq., which provides for injunctions and civil penalties against those engaging in unfair competition, to a company involved in the commercial distribution of obscene films and magazines.

such an action remain to be addressed.[7]

Remedies

The defendants contend, on a variety of theories, that the trial court erred in granting any of the relief sought by the City. The City, on the other hand, cites numerous alleged errors by the trial court that led to what it contends was a wrongful denial of other requested remedies. We need not deal with each asserted error since we hold that in this case, injunctive relief against those movies found to be obscene is the only remedy allowable under the public nuisance

7. Three cases have involved appeals in Busch actions, but all dealt with pre-trial issues. People ex rel. Gow v. Mitchell Bros'. Santa Ana Theater (1980) 101 Cal.App.3d 296, 161 Cal.Rptr. 562 (appeal from order granting preliminary injunction); In re Ward (1978) 82 Cal.App.3d 981, 147 Cal.Rptr. 476 (petition for writ of habeas corpus following sentence for contempt of court for violation of preliminary injunction); People ex rel. Camil v. Buena Vista Cinema (1976) 57 Cal.App.3d 497, 129 Cal.Rptr. 315 (Appeal following sustaining of demurrer to cause of action seeking relief under public nuisance statutes against obscene motion picture theater).

statutes. Thus, the trial court erred in awarding damages to the City, in allowing the City's officer "free and total access to all parts of the theatre," in ordering the maintenance of a $100,000 "trust fund" for possible future City legal costs, and in ordering the destruction of the 11 films found to be obscene.

This action was brought under the authority of Code of Civil Procedure section 731, which, inter alia, empowers a city attorney to bring a civil action "to abate a public nuisance." Abatement, however, is the sole relief that section 731 authorizes the city attorney to seek. This is evident when the above-quoted language is compared to the first portion of the statute. That portion allows an action to be brought by "any person whose property is injuriously affected, or whose personal enjoyment is lessened by a

nuisance . . . ." Such a person is expressly authorized to seek a judgment where "the nuisance may be enjoined or abated as well as damages recovered therefor." (Emphasis added.) It is clear that the Legislature intended that one type of litigant could seek abatement and damages, while the other type of litigant could obtain abatement only. A city attorney, in an action "brought in the name of the people," fits squarely and exclusively in the latter classification.

The City attempts to fit itself into the class of litigants who can seek damages by relying on Civil Code section 14, which provides that "the word person includes a corporation as well as a natural person."[8]

8. The City has erroneously cited section 14, which defines words and phrases used in the Civil Code only. However, the identical definition of "person" appears in Code of Civil Procedure section 17, which defines words and phrases used in the Code of Civil Procedure, of which the subject section 731 is a part. We thus treat the City's argument as based on section 17.

The City reasons that since the action was brought by the city attorney at the direction of an incorporated city, this somehow converts the action into one brought by a "person whose property is injuriously affected, or whose personal enjoyment is lessened by a nuisance." This argument borders on the frivolous. We agree with the defendants that "(w)ord games are being employed by Respondent to circumvent the straight-forward provisions of the code." Since abatement is the only relief that can be granted in this case, the portion of the judgment awarding damages must be reversed.

We also conclude that the other remedies granted by the trial court, except for the injunction, are inconsistent with the language of section 731. The City's arguments to the contrary appear to stem from an erroneous view of what

constitutes the public nuisance that may be abated. This misunderstanding can be seen from the City's extensive argument concerning the asserted error of the trial court in refusing to close the defendants' theater for a period of time. The theater should be closed, the City contends, because "(t)he suppression of nusiances injurious to public health or morality is among the most important duties of government." (Phalen v. Commonwealth of Virginia (1850) 49 U.S. (8 How.) 163, 168, 12 L.Ed. 1030, 1033.) It thus appears that the City believes that it is the theater that consitutes the public nuisance.[9] This is an

9. We need not long address the merits of the City's contention that the trial court erred in not closing the defendants' theater. Busch held that such relief "would result in a full and pervasive prior restraint upon the freedom of speech and of the press in violation of the First and Fourteenth Amendments to the United States Constitution." (17 Cal.3d at p. 58, 130 Cal.Rptr. 328, 550 P.2d 600.) The City's argument that this language is merely dictum which does not bind this court is unpersuasive.

incorrect reading of the Busch decision. In Busch, the court states that "the exhibition of obscene magazines and films . . . may be characterized as 'indecent' or 'offensive to the senses'" (17 Cal.3d at p. 49, 130 Cal.Rptr. 328, 550 P.2d 600), talks about "the state's interests in regulating the exhibition of obscene matter" (id., at p. 51, 130 Cal.Rptr. 328, 550 P.2d 600), and concludes that "public nuisance laws may properly be employed to regulate the exhibition of obscene material to 'consenting adults.'" (Id., at p. 53, 130 Cal.Rptr. 328, 550 P.2d 600, emphasis added.) Thus, the public nuisance is not the Theater, nor even the obscene films themselves.[10] It is the exhibition of those

10. That obscene films are not, in and of themselves, public nuisances is recognized in Busch. The court noted (17 Cal.3d at pp. 51-52, 130 Cal.Rptr. 328, 550 P.2d 600) the difference between Stanley v. Georgia (1969) 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 542 and the cases of Paris Adult Theatre I v. Slaton (1973) 413 U.S. 49, 93 S.Ct.

(Footnote Continued On Next Page)

obscene films in the theater that constitutes a public nuisance.

Once it is recognized that the public nuisance is nothing more than the act of exhibiting obscene films, it becomes apparent why all the remedies, save the injunction, are inappropriate. The injunction against the advertisement or exhibition of the 11 obscene films is sufficient to afford the City as full relief as is possible in a section 731 action, i.e., the abatement of the public nuisance. The $100,000 trust fund, the free access to the theater by the City's agents, the destruction of

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2628, 37 L.Ed.2d 446 and People v. Luros (1971) 4 Cal.3d 84, 92 Cal.Rptr. 833, cert. den., 404 U.S. 824, 92 S.Ct. 51, 30 L.Ed.2d 52. Stanley held unconstitutional a prosecution for the private possession of obscene films. Paris and Luros stated, however, that the commercial distribution of obscenity, even to consenting adults, could be constitutionally regulated. Thus, obscene films do not become legally objectionable until they are publicly exhibited or distributed. For this reason in particular, the trial court's order to destroy the 11 obscene films in this case is incorrect.

the obscene films, and the money damages are unauthorized in an action to abate a public nuisance.

The Supreme Court stated the governing principle in Anderson v. Souza (1952) 38 Cal.2d 825, 840-841, 243 P.2d 497: "Injunctive process ought never to go beyond the necessities of the case and where a legitimate business is being conducted and in the conduct thereof a nuisance has been created and is being maintained, the relief granted should be directed and confined to the elimination of the nuisance . . . ." (Emphasis added.) (See also Wade v. Campbell (1962) 200 Cal.App.2d 54, 62, 19 Cal.Rptr. 173; Morton v. Superior Court (1954) 124 Cal.App.2d 577, 582-585, 269 P.2d 81.)[11] Indeed Busch

11. The general rule set forth in Anderson is of particular importance in cases, such as the present one, that involve First Amendment rights:

> "An order issued in the area of First Amendment rights must be couched in the narrowest terms that will accomplish the

(Footnote Continued On Next Page)

holds that abatement in this case is to be accomplished by a "proper and suitable" injunction (17 Cal.3d at p. 57, 130 Cal.Rptr. 328, 550 P.2d 600) and that such abatement "must be directed to particular books or films which have been adjudged obscene following a fair and full adversary hearing, rather than against the premises in which the material is sold, exhibited or displayed." (Id., at p. 59, 130 Cal.Rptr. 328, 550 P.2d 600.)

In summary, we hold that the only purpose of a section 731 action by a city

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pinpointed objective permitted by constitutional mandate and the essential needs of the public order. In this sensitive field, the State may not employ 'means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.' (Citation.) In other words, the order must be tailored as precisely as possible to the exact needs of the case." (Carroll v. President & Commissioners of Princess Anne (1968) 393 U.S. 175, 183-184, 89 S.Ct. 347, 352, 21 L.Ed.2d 325, emphasis added; see also United Farm Workers Organizing Committee v. Superior Court (1971) 4 Cal.3d 556, 570, 94 Cal.Rptr. 263, 483 P.2d 1215.)

attorney is "to abate a public nuisance." To accomplish anything else would be beyond the scope of such an action. The public nuisance in this case is the exhibition of obscene films. If the defendants are permanently enjoined from advertising or exhibiting the films that were found obscene, the public nuisance will have been abated. The other remedies are excessive.

Trial Procedures

In reviewing the procedures employed in the trial court to resolve the issues of obscenity and public nuisance, we are aware of the special constitutional considerations relevant to this type of case. The United States Supreme Court has recently stated that "the regulation of a communicative activity such as the exhibition of motion pictures must adhere to more narrowly drawn procedures than is necessary for the abatement of an ordinary nuisance." (Vance v. Universal Amusement Co., Inc.

(1980) 445 U.S. 308, 315, 100 S.Ct. 1156, 1160-1161, 63 L.Ed.2d 413.) And, as was noted in Busch, "the California public nuisance statutes must be enforced in such a way as to operate in a constitutional fashion." (17 Cal.3d at p. 55, 130 Cal.Rptr. 328, 550 P.2d 600.)

It is well settled that obscenity is not protected by the First Amendment. (Roth v. United States (1957) 354 U.S. 476, 484, 485, 77 S.Ct. 1304, 1308, 1309, 1 L.Ed.2d 1498.) But, care must be taken in determining what is obscene so as not to interfere with matter that is entitled to a constitutional shield. The job of the courts is to "distinguish commerce in ideas, protected by the First Amendment, from commercial exploitation of obscene material." (Miller v. California (1973) 413 U.S. 15, 36, 93 S.Ct. 2607, 2621, 37 L.Ed.2d 419.) Unarguably, this

distinguishing process must include a "judicial determination in an adversary proceeding." (Freedman v. Maryland (1965) 380 U.S. 51, 58, 85 S.Ct. 734, 738, 13 L.Ed.2d 649; see also Paris Adult Theatre I v. Slaton, supra, 413 U.S. 49, 55, 93 S.Ct. at 2633; Busch, supra, 17 Cal.3d at p. 57, 130 Cal.Rptr. 328, 550 P.2d 600.)

At the outset, we deal with the defendants' contention that a Busch action cannot be maintained in this case. Defendants cite the language in Busch that framed the issue in that case: "we consider whether or not a civil action brought by law enforcement officers to restrain the exhibition of obscene books and films states a cause of action for relief under the public nuisance laws of this state." (17 Cal.3d at p. 47, 130 Cal.Rptr. 328, 550 P.2d 600.) Since the court did not describe the action as one to restrain the exhibition of

allegedly obscene books and films, the defendants argue that Busch applies only where there has been a final judicial determination of obscenity prior to the filing of the public nuisance action. We disagree. It is clear that Busch only requires a judicial determination of obscenity as a condition precedent to the granting of any permanent injunctive relief, not as a prerequisite to the bringing of the action in the first place. We also find it significant that the two post-Busch cases upholding the issuance of preliminary injunctions were both actions against the exhibition of "allegedly" obscene motion pictures (People ex rel. Gow v. Mitchell Bros.' Santa Ana Theater, supra, 101 Cal.App.3d at p.299, 161 Cal.Rptr. 562; In re Ward, supra, 82 Cal.App.3d at p. 983, 147 Cal.Rptr. 476.)

The city asserts as error

the court's pre-trial ruling that the defendants were entitled to a jury trial on the questions of obscenity and nuisance. We need not, however, address the issue of the right to a jury trial in Busch actions. If the court's ruling was error,[12] the City was not harmed by it and

12. As this court has noted before (People ex rel. Gow. v. Mitchell Bros'. Santa Ana Theater, supra, 101 Cal.App.3d at p. 305, fn. 9, 161 Cal.Rptr. 562), it appears that there is no constitutional right to a jury trial in a public nuisance obscenity case. (See also Alexander v. Virginia (1973) 413 U.S. 836, 93 S.Ct. 2803, 37 L.Ed.2d 993; Penthouse Intern., Ltd. v. McAuliffe (5th Cir. 1980) 610 F.2d 1353, 1363, cert. dis., ___ U.S. ___, 100 S.Ct. 3031, 65 L.Ed.2d 1131.) This is true despite seemingly contradictory language in cases decided contemporaneously with Alexander. In Paris Adult Theatre I v. Slaton, supra, the court validated civil actions to regulate obscenity as long as the state law "meets the First Amendment standards set forth in Miller v. California". (413 U.S. at p. 69, 93 S.Ct. at p. 2641). Miller v. California (1973) 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419, enunciates the test to be applied in obscenity cases, which test includes the application of "contemporary community standards." (413 U.S. at p. 24, 93 S.Ct. at p. 2615.) Miller also instructs that "(i)n resolving the inevitably sensitive questions of fact and law, we must continue to rely on the jury system, accompanied by the safeguards that judges, rules of evidence, presumption of innocence, and other protective features provide . . . ." (413 U.S.

(Footnote Continued On Next Page)

thus cannot raise it on appeal. (Code Civ.Proc., § 475.) Despite the court's ruling, it is clear,as even the City for some reason argues, that when the court made its order concerning the injunction, it exercised a fact-finding judgment independent from the verdicts of the jury.[13]

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at p. 26 93 S.Ct. at 2616, emphasis added.) A jury trial thus seems to be a significant part of the "First Amendment standards set forth in Miller." (See also Note, The Devil and the D.A.: The Civil Abatement of Obscenity (1977) 28 Hastings L.J. 1329, 1337-1340; Note, Obscene Material as a Public Nuisance (1977) 65 Cal.L.Rev. 330, 340; McKinney v. Alabama (1976) 424 U.S. 669, 687-689, 96 S.Ct. 1189, 1199, 47 L.Ed.2d 387 (conc. opn. of Brennan, J.); People v. E.W.A.P., Inc., supra, 106 Cal.App.3d 315, 325, 165 Cal.Rptr. 73 (dis. opn. of Kaus, P.J.).)

13. Conclusion of law number IV of the trial court's "Findings of Fact and Conclusions of Law" preceded a list of eleven filmsby stating: "Based upon the Court's personal viewing, each of the following motion picture films named below constitute subject matter which is obscene beyond a reasonable doubt, as the term 'obscene' is defined in Penal Code Section 311(a) . . ." (Emphasis added.) During a hearing concerning the "Findings of Fact and Conclusions of Law", the judge explained that the Conclusion of Law "intended to show based upon the court' personal viewing rather than the jury's deliberations, because I personally viewed these films also. And I am making this, made the decision on the equitable issues that each of the

(Footnote Continued On Next Page)

Since we have held that the injunction is the only proper remedy in this case, the jury was at most an advisory body. If any party is entitled to raise the jury trial issue it is the defendants. They did not however, raise it.

The city also contends that the trial court erred in requiring the fact of obscenity to be proved "beyond a reasonable doubt." The court established the high burden of proof based on the reasoning of Mr. Justice Brennan's concurring opinion in McKinney v. Alabama, supra, 424 U.S. 669, 678, 96 S.Ct. 1189, 1195 (conc. opn. of Brennan, J.). The City relies on Mugler v. Kansas (1887) 123 U.S. 623, 8 S.Ct. 273, 31 L.Ed. 205, to support its position that the burden of proof should be by "clear

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following motion pictures named below constitute subject matter which is obscene beyond a reasonable doubt as the term defined in Penal Code section 311(a)." (Emphasis added.)

and convincing evidence."[14] We agree with the trial court that the issue of obscenity vel non in a public nuisance abatement action must be proved beyond a reasonable doubt.

Mugler involved the constitutionality of a Kansas law that, inter alia, required the closing as a "common nuisance" of those buildings found by a court to be "places where intoxicating liquors are manufactured, sold, bartered, or given away . . ." (123 U.S. at p. 670, 8 S.Ct. at p. 301.) In rejecting the defendants' contention that the procedures under the statute violated due process of law, the Court stated: "The court is not to issue an injunction simply

14. Apparently, the City concedes that the "preponderance of the evidence" burden of proof would be inadequate. Although arguing that the burden should have been a "preponderance of the evidence" for the jury trial on damages, the City states that "the burden of proof on the equitable trial should have been by 'clear and convincing' evidence." We are only concerned with the burden of proof for the latter, since we hold that the injunction is the only appropriate remedy.

because one is asked, or because the charge is made that a common nuisance is maintained in violation of law. The statute leaves the court at liberty to give effect to the principle that an injunction will not be granted to restrain a nuisance, except upon clear and satisfactory evidence that one exists." (123 U.S. at p. 673, 8 S.Ct. at p. 303, emphasis added.) If this were a normal public nuisance abatement action, this language from Mugler might be persuasive. (See e.g., People v. Frangadakis (1960) 184 Cal.App.2d 540, 550, 7 Cal.Rptr. 776 (burden of proof in action to abate a public nuisance under Bus. & Prof.Code, § 25604 is by a preponderance of the evidence.).) This is not, however, a normal action. As we noted earlier, the Supreme Court has recognized that "more narrowly drawn procedures" are required when the nuisance to be abated is the

exhibition of obscene films. (Vance v. Universal Amusement Co., Inc., supra, 100 S.Ct. at pp.1160-1161.) We conclude that one of the required procedures is that obscenity be proven beyond a reasonable doubt.

In McKinney v. Alabama, Mr. Justice Brennan wrote a concurring opinion concerning the procedural problems involved in a civil obscenity action. In a portion of that opinion, which was joined by Mr. Justice Marshall and Mr. Justice Stewart, Brennan dealt with the issue of the burden of proof in such actions. (424 U.S. at pp. 683-687, 96 S.Ct. at p. 1197.) It was there concluded that "the hazards to First Amendment freedoms inhering in the regulation of obscenity require that even in . . . a civil proceeding, the State comply with the more exacting standard of proof beyond a reasonable doubt." (Id., at pp. 683-684, 96 S.Ct. at p. 1197.)

Although we agree with the entire "burden of proof" portion of the Brennan opinion, one passage is particularly persuasive:

> "Inherent in all factfinding procedures is the potential for erroneous judgments and, when First Amendment values are implicated, the selection of a standard of proof of necessity implicates the relative constitutional acceptability of erroneous judgments. 'There is always in litigation a margin of error, representing error in factfinding, which both parties must take into account. Where one party has at stake an interest of transcending value . . . this margin of error is reduced as to him by the process of placing on the other party the burden . . . of persuading the factfinder at the

conclusion of the trial of (the existence of the fact) beyond a reasonable doubt.' Speiser v. Randall, 357 U.S. 513, 525-526, 78 S.Ct. 1332, 1342, 2 L.Ed.2d 1460, 1472 (1958). See, e.g., In re Winship, 397 U.S. 358, 369-372, 90 S.Ct. 1068, 1075-1076, 25 L.Ed.2d 368, 378-380 (1970) (Harlan, J., concurring). . . . In the civil adjudication of obscenity vel non, the bookseller has at stake such an 'interest of transcending value'-protection of his right to disseminate and the public's right to receive material protected by the First Amendment. Protection of those rights demands that the factfinder be almost certain-convinced beyond a reasonable doubt-that the materials are not constitutionally immune from suppression." (424 U.S. at p. 684, 96

S.Ct. at p. 1197, original emphasis.)

Discovery

One month prior to the commencement of the jury trial in this action, on of the defendants (James Mitchell) was ordered to pay $5,000 in sanctions to the City's counsel for noncompliance with earlier discovery orders. The defendants now seek a reversal of that order.[15]

15. Despite the City's contention to the contrary, the order is properly before this court for review. The City argues that the "collateral order doctrine" (see generally In re Marriage of Skelley (1976) 18 Cal.3d 365, 368, 134 Cal.Rptr. 197, 556 P.2d 297; Sjoberg v. Hastorf (1948) 33 Cal.2d 116, 119, 199 P.2d 668) makes the order imposing sanctions an appealable one which was subject to review here only upon a timely appeal from that order or a petition for a prerogative writ. However, while the collateral order doctrine has been applied to make appealable orders imposing sanctions for an attorney's misconduct at trial (Bauguess v. Paine (1978) 22 Cal.3d 626, 634, fn. 3, 150 Cal.Rptr. 461, 586 P.2d 942) and for a party's failure to attend a mandatory settlement conference (Wisniewski v. Clary (1975), 46 Cal.App.3d 499, 502, 120 Cal.Rptr. 176), it has been held not to apply to orders imposing sanctions for refusal to make discovery. (Lund v. Superior Court (1964) 61 Cal.2d 698, 709, 39 Cal.Rptr. 891, 394 P.2d 707; Freidberg v. Freidberg (1970) 9 Cal.App.3d 754, 764, 88 Cal.Rptr. 451; Munson v. Singer (1965) 238 Cal.App.2d 697, 48

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We find it impossible to reverse the order imposing sanctions because defendants have provided an inadequate record. The $5,000 sanction was imposed as part of the court's "Second Order Compelling Answers to Questions and Production of Documents and Things, and for Reasonable Expenses and Attorney's Fees." That order required Mitchell to answer well over 100 deposition questions and produce four different types of documents. Defendants make a broad attack on this order, claiming that the questions and documents relate to the defendants' finances and that financial information is relevant only where punitive damages are proper. The defendants cannot prevail on this issue for two separate reasons. First, the record is incomplete in that it does not contain 49

Cal.Rptr. 167.) Thus, the order here complained of is nonappealable on its own and may be reviewed now that a final judgment in the case has been entered. (See Code Civ.Proc., § 906.)

of the deposition questions that Mitchell was required to answer.[16] Second, the defendants have failed to specify how the questions and documents relate to their finances.[17] The defendants have not carried their burdens of making an affirmative showing of error by an adequate record (In re Kathy P. (1979) 25 Cal.3d 91, 102, 157 Cal.Rptr. 874, 599 P.2d 65; Rossiter v. Benoit (1979) 88 Cal.App.3d 706, 711-712, 152 Cal.Rptr. 65) or of pointing out reversible error in their

16. The court ordered Mitchell to answer, inter alia, "those questions set forth in the Declaration of James J. Clancy in support of plaintiff's Motion numbered 80 through 128 . . ." This declaration, however, is not in the record.

17. A cursory review of the discovery orders reveals that most of the questions which Mitchell was required to answer have nothing to do with economics. For example: "Would you say that 'Behind the Green Door' was hard-core pornography?", "How does Cinema 7, Inc., determine what films are going to be shown at various theaters?", "Who wrote the film play, 'Sodom and Gomorrah'?", "Did you do any camera work on "Resurrection of Eve'?", "Are there different versions of the film, 'Sodom and Gomorrah', or are they all essentially the same?"

brief (Fox v. Erickson (1950) 99 Cal.App.2d 740, 741-742, 222 P.2d 452.)

We have considered, but do not discuss, the numerous other points raised by both parties. Most concerned asserted errors during the jury trial for damages, which we have decided should not have been held. The remaining points are completely unmeritorious.

The $5,000 discovery sanction and those parts of the "Judgment After Trial by Court" enjoining the defendants from advertising or exhibiting the eleven films found by the trial court to be obscene beyond a reasonable doubt and denying the City's requests for a constructive trust on the defendants' box office receipts, a revocation of the defendants' license, and the closure of defendants' theater for one year are affirmed. The "Judgment on Verdicts in Open Court" awarding $76,400

in compensatory damages to the City and those parts of the "Judgment After Trial By Court" ordering access for the City's officers to all parts of the defendants' theater for two years, the payment by the defendants of $100,000 into a trust fund for the City's future attorney fees, and the destruction of the prints of the films declared obscene are reversed.

GARDNER, P. J., and McDANIEL, J., concur.

APPENDIX B

(Reference; Petition at pg. 2,
24,
27, fn. 6.)

Amended Memorandum of Opinion of Trial Judge Marvin Weeks on the issues of:

1. Constructive Trust;

2. Revocation of Defendants' Business License;

3. Closure of Defendants' Theater; filed June 6, 1978.

.....B-1 thru B-161

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ORANGE

PEOPLE OF THE STATE OF CALIFORNIA ex rel. KEITH GOW, City Attorney of the City of Santa Ana, California, Plaintiff, vs. MITCHELL BROTHERS' SANTA ANA THEATRE, etc., et al., Defendants.	CASE NO. 25-65-30 AMENDED MEMORANDUM OF OPINION ON THE ISSUES OF: 1. Constructive Trust 2. Revocation of Defendant's Business License 3. Closure of Defendants' Theatre

FILED
June 6, 1978
WILLIAM E. ST JOHN, County Clerk
By _____ Deputy

This action came on regularly for trial on the 11th day of October, 1977, in Department 1 Extra Sessions sitting in Departments 18, 37, and 40 of the above-entitled court, the Honorable MARVIN G. WEEKS, Judge Assigned, presiding, the plaintiff appearing by attorney JAMES J. CLANCY, and the defendants appearing by attorney JOSEPH RHINE, and the Court on October 17, 1977, having ordered a jury trial on the issues of

"obscenity", "public nuisance", and "damages", to precede determination of the equitable issues of "imposition of a constructive trust on defendants' box office receipts," revocation of defendants' business licenses and permits, and closure of defendants' theatre; and a jury of 12 persons having been regularly impaneled and sworn to try the issues of "obscenity", "public nuisance", and "damages", and having heretofore returned its verdicts on said issues as more particularly set forth in the "Judgment on Verdicts in Open Court", a copy of which is attached hereto, marked EXHIBIT "A", and incorporated herein by reference; thereafter on January 4th and 5th, 1978, the Court heard and considered oral arguments by both counsel on the equitable issues of "Imposition of a constructive trust on defendants' box office receipts", "Revocation of defendants' business licenses and permits,"

and "Closure of defendants' theatre." The Court also reread and considered applicable portions of plaintiff's and defendants' Trial Briefs pertaining to these issues; and the Court having granted leave to both counsel to submit written arguments and supplemental points and authorities on the issues; and the Court having received, read, and considered said written arguments, and points and authorities, and the matter having been duly submitted to the Court for its decision now renders its Memorandum of Opinion as follows:

BACKGROUND

In late 1975, the defendants took over the United Artist Theatre at 1565 West Seventeenth Street in the City of Santa Ana, California, located in a modern shopping center known as "Honer Plaza". Honer Plaza is located on the northwest corner of Bristol Street on the East, and Seventeenth

Street to the South. The theatre is the westerly-most structure of the shopping center, and is a single standing structure. Immediately to the west are a number of Government buildings, County and/or State. To the east is a bank, a supermarket, a major drug store, one or two major department stores, and a host of other smaller shops. To the South, directly in front of the theatre and running parallel to Seventeenth Street westerly from Bristol Street, is the Santa Ana College. West of the college is a church and kindergarten school. West of the government buildings, and north of the theatre, is residential. Prior to defendants' operation of the theatre, it featured family-type "G" and "PG" rated films. In late 1975, defendants converted the theatre to an "Adult" theatre, specializing in sexually explicit films, and continues to operate it as such. In November,

1975, the City of Santa Ana hired James J. Clancy, counsel herein, to draft and submit a City Ordinance declaring the "commercial exploitation of patently offensive sexual conduct in lewd films, and theatres exhibiting the same, to be a public nuisance, and ordering their abatement." On January 5, 1976, the City of Santa Ana passed and adopted such an Ordinance. (Santa Ana Ordinance N.S. 1287, a copy of which is attached hereto as EXHIBIT "B") Between November 1975 and adoption of the Ordinance, plaintiff's counsel herein conducted sub rosa surveillance at the theatre to gather evidence to be presented to the Santa Ana City Council relative to the provisions of the proposed Ordinance. During this time, the case of People ex rel. BUSCH vs Projection Room Theatre 17 Cal 3d 42 which provided the legal basis of this case, was pending in the California Supreme Court,

and was finally decided in June or July of 1976. It should be noted that City Ordinance N.S. 1287 was identical to City of Duarte Ordinance 369 with which plaintiff's counsel herein was also involved, and that the Duarte ordinance was the subject of litigation pending in the Appellate Courts in People ex rel. William Camil vs Buena Vista Cinema 57 Cal App 3d 497, until April 1976 when that case was decided.

After the "Camil" case, supra, was decided, the City of Santa Ana passed and adopted Ordinance No. 1325 (a copy of which is attached hereto as EXHIBIT "C") on October 26, 1976, to amend Ordinance No. 1287, in an effort to avoid the fate of the Duarte Ordinance decided by the Court in "Camil", supra. Thereafter, on October 26, 1976, the Santa Ana City Council passed and adopted Resolution No. 76-134 (a copy of which is attached hereto as EXHIBIT "D")

pursuant to its Ordinance No. 1287 and 1325, wherein it resolved that:

> "the real property and activity known as the Mitchell Brothers' Santa Ana Theatre, located at 1565 West 17th Street, Santa Ana, California, is in violation of Ordinance No. 1325 of the City of Santa Ana," and "declaring such activity to be a public nuisance, revoking all licenses and permits, and ordering abatement," and "ordering the City Attorney to take all steps necessary to comply with Section 12-105 of the Santa Ana Municipal Code."

On November 2, 1976, and pursuant to the alleged authority of the above ordinances and resolution, the City Attorney for the City of Santa Ana, and on behalf of the

City, filed the within action. As previously recited hereinabove, the jury has heretofore rendered its verdicts on the issues of "public nuisance" and "damages", leaving for the Court a determination of the following issues:

I

WHETHER OR NOT A CONSTRUCTIVE TRUST SHOULD BE IMPOSED IN FAVOR OF PLAINTIFF ON THE BOX OFFICE RECEIPTS OF DEFENDANTS' MITCHELL BROTHERS' SANTA ANA THEATRE FOR THE PERIOD SEPTEMBER 3, 1975 TO APRIL 12, 1977?

Between September 3, 1975 and April 12, 1977, and except for a few days unaccounted for, which is of no significance here, defendants' gross box office receipts at its Mitchell Brothers' Santa Ana Theater totaled $667,289.87 (Plaintiff's Exhibits 110A-Z).

It is these receipts that plaintiff contends is the res of a constructive trust which the Court should impose, with plaintiff as the beneficiary. Defendants did not see fit to offer any evidence of operating costs during this period, therefore, the above figure will be used for the purpose of this part of this Op[illegible].

The plaintiff's theor[illegible] that, under general equity principles, the monies received as box office receipts from the exhibition of hardcore pornography should be impressed with a constructive trust for the benefit of the people who allegedly have been harmed by the alleged unlawful activity.[1] In passing, and without belaboring the point, it appears the plaintiff herein, the City Attorney of the City of Santa Ana, has standing by virtue of Civil Code Section 731, to bring the action of public nuisance against defendants and to

assert therein the remedy of constructive trust. Plaintiff relies on the concept of unjust enrichment as the basis for imposing a constructive trust in this case, and cites Beck vs West Coast Life Insurance Co. 38 Cal. 2d 643, where a named beneficiary murdered the insured, and the cases where one joint tenant murders the other, citing Abby vs Lord 168 Cal.App.2d 499, and Johansen vs Pelton 8 Cal.App.3d 625. It should be noted here that plaintiff's position on this issue, which he presented orally on the dates mentioned herein, is contained on pages 86 through 96, inclusive, of his Trial Brief. Among the arguments of plaintiff is that defendants should not be allowed to gain from their alleged illegal activity between the time the action was filed and the date the case finally got to trial.

In addition to defendants' oral

argument against imposition of a constructive trust on the box office receipts, their Trial Brief addresses the issue at pages 14 through 16, and rely in part on the case of People vs. Superior Court (Jayhill Corp) (1972) 23 Cal.App.3d 85, 100 Cal.Rptr. 38, where the Appellate Court determined that the Attorney General did not have standing to seek restitution from defrauded customers of defendants. The judicial history of that case is, that a hearing was granted by the California Supreme Court, which decided the case on April 5, 1973 by issuing a Writ of Mandate setting aside the Order below, and held in effect that in an action brought by the Attorney General under Business and Professions Code Section 17535, even as it read then, a court of equity could grant ancillary relief and order defendants to make restitution to the customers (9 Cal.3d

283). In 1972 the Legislature amended Business and Professions Code Section 17535 to expressly provide for such relief. It would therefore appear that defendants' bold statement at line 23-25, page 14, of their Trial Brief that "plaintiff's whole argument concerning his constructive trust is destroyed by the Jayhill Corp case", supra, is ill-founded reliance on what appears to be an overturned decision.

In reviewing the applicable statutes on constructive trusts, it is found that Civil Code Section 2223 reads as follows:

> "INVOLUNTARY TRUSTEE, WHO IS. One who wrongfully detains a thing is an involuntary trustee thereof, for the benefit of the owner."

Civil Code Section 2224 reads as follows:

> "INVOLUNTARY TRUST RESULTING FROM NEGLIGENCE, ETC. One who gains a thing by fraud, accident,

mistake, undue influence, the violation of a trust, or other wrongful act, is, unless he has some other and better right thereto, an involuntary trustee of the thing gained for the benefit of the person who would otherwise have had it."

Civil Code Section 3517 reads as follows:

"No one can take advantage of his own wrong."

A constructive trust is a remedy used by a court of equity to compel a person who has property to which he is not justly entitled to transfer it to the person entitled thereto. Witkins Summary of California Law 8th Edition, page 5487, Section 131. A constructive trust will be imposed where a person obtains property by fraudulent representation, Walter H. Leimert Co vs Woodson 125 Cal.App.2d 186; where

property is taken by mistake, First National Bank vs Wakefield 148 Cal. 558; where property is obtained by violation of some fiduciary or beneficial relationship, Cardoza vs Bank of America 116 Cal.App.2d 833; Gerhardt vs Weiss 247 Cal.App.2d 114, Lucas vs Associacao etc 61 Cal.App.2d 344.

In this case, the jury has expressly found by its verdict on exemplary damages that defendants were "not guilty of . . . fraud," and based on the evidence this Court accepts the jury's finding on this issue, and therefore it appears that fraud does not constitute a basis for imposition of a constructive trust herein. Based on the evidence, it also appears that defendants are not guilty of negligence, accident, mistake, undue influence or violation of any trust that would be applicable here, and therefore no constructive trust can be imposed on the basis of any of these factors.

The only possible basis for imposition of a constructive trust would be if defendants were guilty of some "wrongful act" as that phrase is used in the statute. The cases interpreting this phrase appear to construe "wrongful act" as crime, and would seem to be a factor considered in the insurance cases, such as Beck supra and the joint tenancy cases, such as Abbey supra.

In this case the only "wrongful act" by defendants that could be asserted by plaintiffs is the showing of sexually explicit film, some of which were later determined by a jury to be obscene and therefore constituted public nuisances.

While the same acts alleged and proved here might constitute a violation of Penal Code Section 311 in a Criminal proceeding, the fact remains that defendants have not sustained a criminal conviction in this case, and, thus, the question is: does the

maintenance of a public nuisance by the showing of obscene film constitute such a "wrongful act" as contemplated by the statute, so as to justify the imposition of a constructive trust? I think not. In reviewing the cases where a constructive trust was imposed as a result of a "wrongful" or "criminal" act, it appears that in each case there was some underlying instrument that would have taken effect, EXCEPT for the imposition of a constructive trust, that was not within the contemplation of the parties to the instrument. In the Beck case, supra, an insurance policy; in the Abbey case, supra, a joint tenancy deed. There is no such instrument in this case.

Another problem is that plaintiff is not seeking restitution by way of imposition of a constructive trust on behalf of defendants' paying customers, but on its own behalf. Plaintiff produced no

disgruntled customers of defendants, complaining about not getting their money's worth. On the other hand, defendants produced a regular customer of the theatre, a Mr. Gilbert, whose testimony indicated that at least he was more than satisfied with the film shown by defendants. Therefore, assuming for the sake of analysis that there is some basis for a constructive trust, is plaintiff the proper beneficiary in his own right? I think not. In the language of the Code, defendant "... is, unless he has some other and better right thereto, an involuntary trustee of the thing gained for the benefit of the person who would otherwise have had it." This conclusion is consistent with one of the holdings in People vs Superior Court (Jayhill Corp) 9 Cal.3d 283. While it is recognized that the Jayhill case, supra, was decided in part under Business and

Professions Code Section 17535, the Court said at page 286 "In particular in an action by the Attorney General under Section 17535, a trial court has the inherent power to order, as a form of ancillary relief that the defendants make or offer to make restitution to the customers found to have been defrauded." Plaintiff, in reliance on language quoted on page 89 of this Trial Brief from the Beck case, supra, asserts that the inquiry is not limited to the question of "who is the person who would otherwise have had it?" but includes the broader question of "who is the injured party?" In analyzing the insurance cases, we see that the so-called "injured party" is the estate of the deceased victim, or an alternative beneficiary, and in the joint-tenancy cases, it is a relative of the deceased joint tenant. It would appear to me to be a giant stretch of legal theory to

bring plaintiff into the realm of "injured party" in this case.

The Court has found no case in this State where a constructive trust has been imposed on box office receipts of a theatre for the showing of obscenity. State ex rel Ewing vs "Without A Stitch" 307 N.E.2d 911, is an Ohio case, cited by both plaintiff and defendants in their respective Trial Briefs. It should be noted that plaintiff's counsel herein was one of appellee's counsel in the Ohio case. This Ohio case addresses itself inter alia to a rather shakey and unclear "forfeiture" issue involving box office receipts. At the outset it is to be noted that Ohio, unlike California, has a civil statutory scheme for controlling or attempting to control the showing of obscene motion picture film. This is contained in Ohio statutes R.C. 3767.01 et seq. Plaintiffs (appellees) filed a complaint in

which they demanded inter alia, forfeiture of all receipts derived from the exhibition of "Without A Stitch". The trial court reserved a decision on this issue pending the outcome of appellate review of its finding on obscenity. The Appellate Court ordered the appellants to account and pay to the County Treasurer the receipts obtained from showing "Without A Stitch" after the date on which the trial court's permanent injunction would have become effective had the Judge not stayed it. It appears that under the Ohio statute, the trial judge had no power to stay the injunction. The Ohio Supreme Court construed the action of the Appellate Court as an effort to rectify the error of the trial court in staying the injunction and, therefore, upheld the Appellate Court's "pay over order" of net receipts, for showing "Without A Stitch" after the date when the

injunction should have gone into effect. It must be pointed out here that this limited order was only for net receipts received for showing the film after a finding of obscenity. Of course, here plaintiff seeks to impose a constructive trust for the showing of film going back two years before a finding of obscenity.

While plaintiffs in the Ohio case demanded forfeiture of box office receipts in their complaint, it was pointed out by the Ohio Supreme Court that R.C. 3767.01 et. seq. did not provide for forfeiture, and that the trial court should have dismissed that portion of the complaint. This limited holding by the Ohio Supreme Court does not support the broad assertions of plaintiff herein. Another factor for consideration on this issue is that the jury, after due deliberation, awarded plaintiff compensatory damages in the sum of $76,400.00. It would

appear that to now forfeit or impose a constructive trust, even on the box office receipts of those eleven film found to be obscene by the jury, would smack of double recovery for the same wrong.

Finally, it is to be noted that there is no evidence before the Court that defendants have exhibited any of the eleven motion pictures found to be obscene by the jury since return of the verdicts on December 6 and 7, 1977.

Based on all the above, the evidence in the case, and the totality of the circumstances, the Court denies the plaintiff's prayer, motion, and request for imposition of a constructive trust on the box office receipts of defendants Mitchell Brothers' Santa Ana Theatre from November 7, 1975 to April 12, 1977.

II

WHETHER OR NOT PLAINTIFF IS ENTITLED TO AN ORDER RATIFYING THE ACTION OF THE SANTA ANA CITY COUNCIL BY ITS RESOLUTION NO. 76-134, REVOKING ALL LICENSES AND PERMITS ISSUED BY THE CITY TO THE DEFENDANTS?

In discussing this issue, and the next, it would appear appropriate at this point to quote from Flack vs. Municipal Court 66 Cal.2d 981 footnote (15)

"But obscenity is not a problem related exclusively to this modern generation. A century and a half ago Thomas Jefferson also deplored obscenity and its corrupting effect upon society, but reached a somewhat different conclusion: 'I deplore . . . the putrid state into which our newspapers have passed, and the malignity, the vulgarity, and the mendacious

spirit of those who write them . . . These ordures are rapidly depraving the public taste. It is, however, an evil for which there is no remedy: our liberty depends on the freedom of the press and that cannot be limited without being lost.' (See Knovitz, Bill of Rights Reader (1954) p. 412.)"

In this case we are not dealing with newspapers, or any other segment of the honorable and professional news media: what the Court is dealing with is obscenity, hardcore pornography, or as it is sometimes referred to by a more palatable name "sexually explicit material", and more specifically in this case, obscene motion picture film. With respect to the exhibition of sexually explicit motion picture film, the words of Thomas Jefferson are as equally applicable today as they were to newspapers a hundred and fifty years ago, because the United States Supreme Court has ruled "that expression by means of motion pictures is

included within the free speech and free press guaranty of the First and Fourteenth Amendments." Freedman vs Maryland 380 U.S. 51. As a broad basic principle, we also know that a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license without narrow, objective, and definite standards to guide the licensing authority is unconstitutional. Shuttlesworth vs. Birmingham 394 U.S. 147. So it is against this backdrop of Constitutional guarantees that the action of the City Council revoking defendants' licenses and permits in this case must be viewed.

At the outset, the Court points out that on December 12, 1977, it ruled as unconstitutional at least a part of Ordinance N.S. 1287 and N.S. 1325, as well as at least parts of Resolution No. 76-134. This arose through the efforts of plaintiff's counsel to introduce the ordinances and

resolution as evidence before the jury in an effort to prove malice on the part of defendants to-wit: that defendants continued to show sexually explicit motion pictures already found by the City Council to be "lewd". (It is interesting to note that the ordinance definition of "lewd" is essentially the definition that counsel for plaintiff has asserted throughout this case, is the definition of "obscenity" promulgated by Miller vs California 413 U.S. 15, and incorporated into Penal Code Section 311 by reference. (See plaintiff's proposed jury instruction 16.)

At the time of its December 12, 1977 ruling, the Court was concerned primarily with Section 12-103, Subsection (c) of Ordinance No. N.S. 1287, and Section 12-104 (c) of Ordninance No. N.S. 1325. (EXHIBITS "B" and "C"). In comparing these two provisions, it is readily apparent that while

the language in N.S. 1325 Section 12-104(c) has been changed from the prior ordinance, the intent and effect is the same; to-wit: A legislative adjudication of obscenity by the City Council. A quick look at Section 2, Subsections A and B, and Section 3, Subsection A, of Resolution No. 76-134 (EXHIBIT "D") reveals that the City Council did just that. In its December 12, 1977 ruling, the Court was also concerned with Section 12-103 Subsection (D) of N.S. 1287, and Section 12-104, Subsection (E) of N.S. 1325. It is clear, from reading these two sections, that the sole thrust of the provisions is to "summarily abate" the showing of film by defendants, which the Council would have previously determined was obscene, and to require a "voluntary" surrender of said film. Referring to Section 6, Subsection B, of Resolution No. 76-134, we see that the Council did in fact order

summary abatement.

Also of concern to the Court in its December 12, 1977, ruling was Section 12-103, Subsection (F)(3) of N.S. 1287, and Section 12-104, Subsection (G)(3) of N.S. 1325, both of which undertakes to declare motion picture film contraband and subject to forfeiture upon a determination by the Council. Referring to Section 7, Subsection B, of Resolution 76-134, we note that the City Council did, in fact, order 26 films and previews it determined obscene to be considered as contraband and forfeited. In this Court's opinion, one does not have to be a Constitutional scholar, or a legal giant, to reach the conclusions that these Ordinance provisions, and the Council's action taken pursuant thereto, are constitutionally prohibited "prior restraints" and "censorship" of the first water. The Court need look no further than the Camil case, supra, handled by plaintiff's counsel

herein, to find legal support for this conclusion. At page 502 of the Camil case, supra, Justice Compton stated:

> "The first and foremost requirement is a judicial determination, prior to abatement, of the obscene character of the films under prevailing law. Patently the City Council could not by ordinance, adopt its own definition of obscenity, and even the most formal administrative proceeding to determine the issue of obscenity under prevailing law could not suffice as a substitute for a judicial determination. Further, the Council's Resolution that particular films were obscene would not be binding on the Court in any abatement proceeding instituted thereafter."

Based on the above acts, circumstances, and law, the Court herein on December 12, 1977, determined that the referred to sections were unconstitutional, and refused to allow

plaintiff to present this evidence to the jury.

In that ruling the Court, however, did not specifically consider the license revocation provisions of Section 12-104, Subsection (D) of N.S. 1325 and Section 4 of Resolution No. 76-134 (The Court notes that N.S. 1287 contains no license revocation provisions) and will now undertake to do so. The relief sought by plaintiff re: the licenses and permits, as stated in the prayer of the first amended and supplemental complaint is:

> "That the action taken by the City Council of Santa Ana in Resolution 76-134 dated October 26, 1976, revoking all licenses and permits issued as a part of the operation of Mitchell Brothers' Santa Ana Theatre be confirmed and approved as a valid revocation of said licenses, such revocation to be effective from October

26, 1976; . . ."

No evidence was introduced by plaintiff as to the type of license or permits involved, when they were issued, the purpose of the license, when they expired, whether they were "taxing license", or "regulatory licenses", nor were copies of the licenses, or evidence of the City's licenses ordinance presented to the Court.

Independent research by the Court of the Santa Ana Municipal Code reveals that Chapter 12, Article III, deals with "Lewd Films and Theatres Exhibiting Lewd Films," and is a codification of Ordinances N.S. 1287 and N.S. 1325, which has previously been discussed herein, and which contains no provisions for the issuance of licenses or permits, but only provisions for revocation; that Chapter 21 deals with License in General, including purpose, and provisions for issuance, enforcement, penalties

and appeal. In the absence of any evidence as to the types of licenses and/or permits here involved, particularly the lack of any evidence that said licenses and/or permits were issued to defendants under some authority other than Chapter 21 of the Santa Ana Municipal Code, it must be presumed that any license or permit issued to defendants was pursuant to Chapter 21 of the Santa Ana Municipal Code. Section 21-1 of Article I reads as follows:

> "The purpose of this Chapter is to provide a revenue for the general operation of the City by the levy of a license tax on all business transactions or activities carried on or occuring within the City and is not intended for regulation. . ."

While on its face it appears quite clear that any license or permit issued under this Chapter is for revenue purposes only, as

opposed to regulation. We know, however, that this expression of purpose is not conclusive, but in considering the provisions of each Section within this Chapter, one can only conclude that the stated purpose, accurately described the operative sections of the Chapter, and thus it would appear that this is a license ordinance for the sole purpose of raising revenue. This conclusion is further supported by a comparison with Chapter 22 pertaining to Massage establishments which is clearly regulatory in nature, or both regulatory and revenue raising. We also find in Chapter 12, the Chapter specifically addressing itself to "Lewd Films and Theatres Exhibiting Lewd Films" in Article III; that Article II addresses itself to "Peep Show Establishments" and is replete with regulatory provisions, pertaining to walls, aisles, doorways, exit signs, lighting, etc. Nothing regulatory

is found in Article III, relating to the issuance or revocation of a license or permit, except that the showing of an obscene film constitutes a public nuisance. Nothing in N.S. 1287 or N.S. 1325 purports to amend Chapter 21, nor has this been argued. Nor has it been argued or asserted that defendants failed to pay the tax as required by Chapter 21. So what we have is the City attempting to revoke a revenue raising license on the basis of an alleged violation of a regulatory ordinance under which no license was issued, adopted October 26, 1976. There is no question in the Court's mind that the City has the power and authority under Business and Professions Code Section 16000 et. seq. to issue license for the purpose of regulating theatres such as defendants' as an exercise of its constitutionally granted police power. It is also apparent to the Court that at the time of

adopting Chapter 21, the Honorable City Council had not anticipated nor foreseen the invasion of its fair City by entrepreneurs bent on exhibiting pornographic and obscene motion picture film. Hence, while it appeared at the outset that we were dealing with a regulatory license scheme for the licensing of motion pictures, the above analysis reveals that we are only dealing with a revenue license; therefore, the first blush issues of "prior restraint" and early access to the courts, which would have raised the application of Freedman vs. Maryland 380 U.S. 51; Bantam Books Inc. vs. Sullivan 372 U.S. 58; Southeastern Promotions vs. Conrad 420 U.S. 546; and O'Brien vs. U.S. 391 U.S. 367, on the Constitutional issue does not rise to the fore as determinative of the Council's action. What does appear determinative on analysis; however, is a real effective date of ordinance N.S.

1325. Section 7 of the ordinance purports to be an urgency clause and reads as follows:

"SECTION 7: URGENCY CLAUSE.

Pursuant to provisions of Subsection (b) of section 36937 of the Government Code of the State of California, this Ordinance is for the immediate preservation of the public peace, health, and safety and shall take effect immediately. The facts constituting the urgency are as follows:

> The purpose of this Ordinance, as is evident from its content, is to enable the City of Santa Ana to abate the type of public nuisance being committed within the City. The City Council deems the showing of lewd films, as defined herein, as being a public nuisance contrary to the public peace, health and safety of the City and its residents. This Ordinance makes certain changes in previously adopted and effective Ordinance NS-1287 required by the decision of the California Court of Appeal in People ex rel. Camil v. Buena Vista Cinema, 129 Cal.Rptr. 315. The City Council deems it

necessary for the immediate preservation of the public peace, health and safety that immediate action be taken to abate said public nuisance pursuant to the terms of this Ordinance.

Adopted this 4th day of October, 1976, by the following vote:

AYES, COUNCILMEN: Yamamqto, Bricken, Ortiz, Garthe, Evans Brandt, Ward

NOES, COUNCILMEN: None

ABSENT, COUNCILMEN: None

/s/ John Garthe
MAYOR

Thereafter on October 26, 1976, the ordinance was purportedly adopted as a regular ordinance. The question then is did the ordinance become effective on October 4, 1976 as an emergency ordinance or thirty days thereafter as a regular ordinance, or did it become effective on October 26, 1976, or thirty days thereafter as a regular ordinance?

California Government Code Section

36937(b) provides that an ordinance becomes effective thirty days after passage unless passed as an emergency statute. To be effective immediately, if it is an ordinance, (it must be passed):

> "(b) For the immediate preservation of the public peace or safety containing a declaration of facts constituting the urgency and is passed by four fifths vote of the city council." Govt. Code Sec. 36937(b)

To be effective immediately the urgency clause of an ordinance by definition must state relevant and persuasive facts necessitating the legislative action for the immediate preservation of public peace, health or safety. Parr v. Carmel (1971), 3 Cal.3d 861. (In Parr the ordinance was struck down on constitutional grounds).

In Morgan v. City of Long Beach (1922), 57 Cal.App. 134, the Court observed that in

the absence of facts showing urgency, the mere declaration of a city council so declaring in an ordinance will not render it immediately operative. The rationale underlying the statutory requirement that facts be stated showing the necessity for immediate enactment is not intended to prove the city council was right but rather to demonstrate that the ordinance was conceived in atmosphere of proper legislative deliberation. Where such recital is made mandatory by statute the mere declaration of the emergency without more does not render the ordinance operative immediately. McQuillan, Municipal Corporations (3d Ed.) Vol. 5, Sec. 15.40, 124.

Section 7 of Ordinance N.S. 1325 fails to state a single fact on which the City Council rests its determination that the adoption of the ordinance as an urgency measure was necessary to preserve the

public peace, health or safety. On the other hand, there are several factors mitigating against the urgency clause. (1) Plaintiff had been conducting sub rosa surveillance of defendant's theatre since late 1971; (2) The City Council enacted Ordinance N.S. 1287 on February 18, 1976, with full knowledge of defendant's business but did not include an emergency clause, nor even a license suspension or revocation clause, and; (3) While Section 7 of N.S. 1325 refers to the Camil case, the fact is Camil was decided in April, 1976 or some six months before the ordinance.

Where an emergency clause is inserted in an ordinance for the purpose of having it take immediate effect and the facts were not sufficiently stated to give it such immediate effect, the effective date of the ordinance is postponed and the operative effect is delayed for thirty days. Morgan

v. City of Long Beach, supra, 139.

Based on the above, the Court is of the opinion that Ordinance N.S. 1325 did not become effective on October 4, 1976 but thirty days thereafter and the action of the council on October 26, 1976 purportedly adopting N.S. 1325 as a regular ordinance was an idle and an ineffective act. We then look to the Resolution adopted on October 26, 1976 to find what facts were before the Council on that date to justify the revocation and find only alleged acts occurring prior to the effective date of the Ordinance.

It is the opinion of the Court that, due to the defects in the Ordinances as pointed out, and the absence of conduct occurring after the effective date of the Ordinance to justify revocation, the Court cannot approve the revocation, and, therefore, plaintiff's prayer, request and motion

for an order that the action taken by the City Council of Santa Ana in Resolution 76-134 dated October 26, 1976, revoking all licenses and permits issued as a part of the operation of Mitchell Brothers' Santa Ana Theatre, be confirmed and approved as a valid revocation of said licenses effective October 26, 1976, is denied. Nothing herein is to be construed as a determination of the constitutionality of Section 12-104 Subsection (D) of N.S. 1325. Further, nothing herein is to be construed as preventing plaintiff from taking further legislative action on the defendants' license, and/or permits. The determination herein is based on the procedural and operative facts presented and discussed.

III

WHETHER OR NOT A TEMPORARY CLOSURE OF DEFENDANTS' MITCHELL BROTHERS' SANTA ANA THEATRE BY WAY OF INJUNCTION IS CONSTITUTIONALLY PERMISSIBLE AS A MEANS OF ABATING A PUBLIC NUISANCE?

At the outset, it is to be noted that the prayer in paragraph 3d of plaintiff's first amended complaint, which seeks closure of defendants' theatre for a period of one year, was stricken by Judge Rutter on defendants' motion on August 16, 1977.

While a prayer is important for a number of reasons (see Witkins California Procedure 2d Edition; pleading Section 374 page 2039) it is generally recognized that in a contested case relief may be had, even in the absence of a prayer. Berg vs Investors Real Estate Loan Co. 207 Cal. App.2d 808. Code of Civil Procedure

Section 580 provides in part that, in contested cases ". . . (T)he Court may grant him any relief consistent with the case made by the complaint and embraced within the issue." There can be no mistake about this being a contested case, and closure of defendants' theatre is consistent with the complaint, and within the issue, provided it is constitutionally permissble; therefore, in determining this issue, this Court is going to consider itself not bound by the fact that the prayer for closure of the theatre has been stricken.

In approaching the constitutional issue arising from a Court closing a theatre and with it the exhibition of all motion picture film, it is noted that plaintiff's Trial Brief, pages 104 through 108, sets forth the position of plaintiff, while defendants' original Trial Brief at page 17 treats the issue as finally disposed of by

Judge Rutter's order of August 16, 1977, striking the closure request from the prayer. However, in defendants' Supplemental Points and Authorities filed January 27, 1978, they address the issue and rely on People ex rel. Busch vs Projection Room 17 Cal.3rd 42, to be discussed further hereinbelow.

For years, Courts in this country, including the United States Supreme Court, have struggled with the problem of obscenity because of its intertwined nature with the guaranties of the First Amendment rights of freedom of speech and expression. In this State there are no State Civil Statutes controlling the exhibition of obscene motion pictures, and Criminal Statutes appear to have been inadequate because the availability, dissemination, and exhibition of obscene material has apparently been on the rise for the last seven or eight years. This is evident by the testimony of defendant James Mitchell in this

case, that he expects film like "Behind the Green Door", found by the jury herein to be obscene, to be on television within the near future. Admirable efforts by City officials, such as here and in Duarte, in response to demands by the constituency to control obscenity, is more often than not zapped by the Courts because the Courts themselves are hamstrung by the Constitutional protections enjoyed by the promoters of obscenity and must conscientiously apply the law as it is, although it is weighted in favor of such promoters. While it has been held that "obscenity", in whatever form, is not within the area of Constitutionally protected speech or press, Kirby vs Municipal Court 237 Cal.App.2d 335, Roth vs United States 354 U.S. 476, Miller vs California 413 U.S. 15, and that commercial exposure and sale of obscene materials to anyone, including consenting adults, is not

constitutionally protected and is subject to State regulation, Kaplan vs California 413 U.S. 115; nevertheless, a State must, in adopting procedures for dealing with obscenity, be extremely careful of the possible restraint of constitutionally protected speech, Flack vs. Municipal Court 66 Cal.2d 981. It has also been held "that obscenity is often separated from Constitutionally protected expression only by a dim and uncertain line, and purported obscenity maintains, until such time as it is judicially determined to be unprotected speech, the same preferred position as does free speech generally . . . . "People vs Superior Court 28 Cal.App.3d 600.

A Court considering the closure of a theatre as in this case is faced with decisions dealing with prior restraint such as Freedman, Bantam Books, and Southeastern Promotions, supra, because, by closing down

a theatre a defendant may be restrained from showing Constitutionally protected film. In Southeastern Promotions, supra, at page 459, the Court said "Any system of prior restraint however comes to this Court bearing a heavy presumption against its Constitutional validity." (Citing Cases)

The evidence upon which the Court is called to make its decision on the issue of closure by injunction is essentially as follows:

Between September 3, 1975, and April 12, 1977 (the dates in issue in this case), defendants exhibited at its theatre described herein, approximately 41, full-length, sexually explicit movie film. This does not include previews of coming attractions, which were also sexually explicit. Of these 41 films the jury actually viewed 17. Of the remaining 24, plaintiff was unable to obtain the film, or saw fit not to,

and defendants, although volunterring to produce 12 of the 17 shown (the other 5 were pursuant to Court order) decided not to voluntarily produce the balance, and for reasons not here relevant the Court did not require them to do so. Although the plaintiff dilligently attempted to prove obscenity of the remaining 24 by way of "time and motion" studies, the Court, for reasons here not relevant, did not allow the "time and motion" studies, to go to the jury on the issue of obscenity, although it did allow them to go to the jury on the issue of damages in this bifurcated trial. The Court, however, personally viewed the 17 film, as well as the 24 "time and motion" studies, and while the Court does not now rule on the obscene nature of the 24 film portrayed in the "time and motion" studies, it does consider the totality of the evidence and circumstances, in reaching its

decision herein.

The jury after due deliberation found 11 of the 17 film viewed obscene, as more particularly set forth in the jury verdicts attached hereto as EXHIBIT "A" by "proof beyond a reasonable doubt." It found 4 of the movies not obscene and could not decide on 2 others. All the film found obscene by the jury exhibited the basest type of obscenity as it is generally thought of by the average, decent, moral person, as well as obscenity as defined by law, dominated by oral copulation, sodomy, masturbation, homosexualism, lesbianism, group sex, portrayed incest, and portrayed rape, the licking of sperm from the bodies of the actors, the smearing of sperm on the face. There were, however, no animals involved, and no violence. In one picture, an adult actress was portrayed as a child, but generally speaking, no children were involved.

As to the 24 "time and motion" studies, it would be a restrained description to call them "sexually explicit".

The jury found that the showing of these 11 obscene film constituted public nuisances for 9 periods of time, spanning approximately 382 days between September 3, 1975 and April 12, 1977, with close to 100 days of such activity occurring after plaintiff had filed and served its complaint herein.

During the course of the obscenity phase of the trial, plaintiff called as an expert witness Dr. Melvin Anchell, a recognized expert on the subject of obscenity and pornography, who testified in essence that the exhibition of sexually explicit film was harmful, generally. During the damages phase, plaintiff called another recognized expert, Dr. Ernest Van den Haag, who testified in substance that showing of

sexually explicit movies at defendants' theatre herein was harmful to the community. On the other hand, defendants called three expert witnesses on the obscenity phase of the trial, Dr. Robert Ernest McIlvenna, Dr. Marguerite Rubenstein, and Dr. Maurice Spottswood, who testified in essence that the viewing of sexually explicit film was not harmful, and might even be beneficial. In considering the conflicting testimony of these experts, this Court accepts the testimony of Dr. Anchell and Dr. Van den Haag, and rejects the testimony of defendants' experts in considering this phase of the case. It is important to note that Dr. Van den Haag specifically testified that sexually explicit or obscene film was particularly harmful to persons under the age of 24, because their sexual views had not yet matured. This is particularly relevant here, because, as pointed out previously,

defendants' theatre is directly across the street from the Santa Ana College, where it would be fair to guess that a large portion of the students are under 24. In addition, as pointed out, there is also a church and a kindergarten across the street and slightly to the west of defendants' theatre. Defendants advertise their "Adult" movies on a large marquee in the parking lot across from the college.

It is clear from the evidence in this case that defendants are engaged in the commercial exploitation of obscene motion picture film. Illustrative of this fact is that defendants grossed from this theatre alone $667,289.87 during the period September 3, 1975 to April 12, 1977. Defendants are not to be condemned for their business acumen; however, that is not in issue here. What is in issue is the fact that, while commercial activity is not

denied constitutional protection of free speech and press, it does not enjoy the same freedoms as matters of political, social, economic, educational, and religious importance to which the Constitutional guaranty of freedom of speech primarily relate. Hirsch vs San Francisco 143 CA 2d 313; Miller vs California, supra.

And, thus, the Court now comes to a further discussion of the Busch case, supra, cited hereinabove, and, rather than paraphrase, wi? quote herein verbatim the applicable, and what the Court considers the controlling part, of that case on the issue of closing the defendants' theatre. At page 58, Justice Richardson stated:

> "In the cases at bench, in addition to relief under the Red Light Abatement Act (Pen. Code, Section 11225 et seq.), [1] plaintiffs seek a preliminary

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[1] As we explain infra, this enactment is inapplicable to any of the cases before us. (Explanation of Footnote: The Busch case determined that Penal Code Section 11225 et seq. was not applicable to obscene film.)

injunction enjoining and restraining defendants 'from conducting and maintaining said premises hereinabove described . . . for the purposes of lewdness and from permitting such acts to take place therein and thereon . . . (and further pray that they) be perpetually enjoined from operating and conducting said premises as a public nuisance.' Both in their briefs and at oral argument plaintiffs have made abundantly clear that, as the prayers of their complaints state, the relief they seek is the abatement and closing down of movie theatres and bookstores exhibiting and selling films and magazines determined to be obscene. Although we have concluded upon well recognized pri ciples of pleading that plaintiffs' complaints state actionable causes for the enjoining of the

exhibition and sale of specific obscene materials, we are satisfied that to grant the relief sought by plaintiffs (i.e., closing down the premises in question) would result in a full and pervasive prior restraint upon the freedom of speech and of the press in violation of the First and Fourteenth Amendments to the United States Constitution. (See Near v. Minnesota (1931) 283 U.S. 697, 711-715, 720 (75 L.Ed. 1357, 1365-1367, 1369, 51 S.Ct. 625); Bantam Books, Inc. v. Sullivan (1963) 372 U.S. 58, 70-71 (9 L.Ed.2d 584, 593-594, 83 S.Ct. 631); Freedman v. Maryland, supra, 380 U.S. 51, 57 (13 L.Ed.2d 649, 653-654); Carroll v. Princess Anne (1968) 393 U.S. 175, 180-181 (21 L.Ed.2d 325, 330-331, 89 S.Ct. 347); see and compare Kingsley Books, Inc. v. Brown, supra, 354 U.S.

436; see also Perrine v. Municipal Court (1971) 5 Cal.3d 656, 664-665 (97 Cal. Rptr. 320, 488 P.2d 648); Flack v. Municipal Court (1967) 66 Cal.2d 981, 985-990, passim (59 Cal.Rptr. 872, 429 P.2d 1921).) The courts of a number of our sister states have similarly held that such prior restraints as here sought by plaintiffs are constitutionally impermissible. (See General Corporation v. State ex rel. Sweeton (Ala. 1975) 320 So.2d 668, 675 (plurality opn.); Gulf States Theatres of La., Inc. v. Richardson (La. 1973) 287 So.2d 480, 489; Mitchem v. State ex rel. Schaub (Fla. 1971) 250 So.2d 883, 886-887; New Rivieria Arts Theatre v. State, supra, 412 S.W.2d 890, 893-895; Sanders v. State, supra, 203 S.Ed.2d 153, 156-157; State ex rel. Little

Beaver Theatre, Inc. vs Tobin, supra, 258 So.2d 30, 32; State ex rel. Ewing v. "Without a Stitch", supra, 307 N.E.2d 911, 917-918; but see People ex rel. Hicks v. Sarong Gals (1974) 42 Cal.App.3d 556, 562-563, (117 Cal.Rptr. 24); Bloss v. Paris Township, supra, 157 N.W.2d 260; Grove Press, Inc. v. Flask, supra, 326 F.Supp. 574, 5780580; United Theaters of Fla., Inc. v. State ex rel. Gerstein (Fla.App. 1972) 259 So.2d 210, 212-213, vacated and remanded 419 U.S. 1028 (42 L.Ed.2d 304, 95 S.Ct. 510).)

"Thus, in Sanders, the Georgia Supreme Court pointed out that 'One obscene book on the premises of a book store does not make an entire store obscene. The injunction closing this store and padlocking it as a public nuisance nessarily halted the future

sale and distribution of other printed material which may not be obscene, thereby precluding the application of the above procedural safeguards (prior notice and a prompt judicial hearing) and creating an unconstitutional restraint upon appellant. This broad result cannot be reconciled with free expression under our Constitutions.' (p.157)

"We are aware of no reported cases authorizing the closing of a bookstore or theater, even after it has been repeatedly determined judicially in a full adversary hearing that all or substantially all of the magazines or films exhibited or sold therein are obscene. Indeed plaintiffs have directed our attention to no such precedents, have presented nothing to countermand or distinguish the authorities referred

to above, and at oral argument stated they could find no authority justifying the closing of bookstores in such circumstances. While we have concluded that a court of equity, having determined particular magazines or films to be obscene, after a full adversary hearing, may enjoin the exhibition or sale thereof by those responsible, we emphasize that the closing of such bookstores or theaters, either temporarily or permanently, or the enjoining of the exhibition or sale on said premises of magazines or films not specifically so determined to be obscene, constitutes an impermissible prior restraint in violation of the First and Fourteenth Amendments to the United States Constitution."

While it is recognized that the Busch case,

supra, was decided on demurrer, it is clear that for this Court to order the defendants' theatre closed would constitute a full and pervasive prior restraint upon the freedom of speech and press in violation of the First and Fourteenth Amendments to the United States Constitution.

Basing its decision then on the Busch case, supra, and the host of authorities cited therein, this Court must reluctantly deny plaintiffs the ultimate relief sought; to-wit: Closure of defendants' theatre for one year, and turn to some other means of giving full recognition to the jury's determinations which this Court considers as the voice of the majority of the moral and decent citizens in the County of Orange, in addition to this Court's independent determinations based on the totality of all the evidence and circumstances herein. In Busch, supra, the Court at page 57, said:

"An abatement of a nuisance is accomplished in a court of equity by means of an injunction proper and suitable to the facts of each case . . . ."

Based on the above then, the Court renders judgment and makes orders on constructive trust, revocation of defendants' license, closure of defendants' theatre, and other injunctive relief as follows:

O R D E R S

I

Judgment for defendants on issue of constructive trust. Plaintiff's prayer, request, and motion to impose a constructive trust on defendants' box office receipts for the period September 3, 1975 to April 12, 1977 is denied.

II

Judgment for defendants on the issue of defendants' license revocation. Plaintiff's prayer, request, and motion to

confirm and approve the action of the City Council in Resolution 76-134 dated October 26, 1976, revoking all defendants' licenses and permits is denied.

III

Judgment for Defendants on the issue of closure of Defendants' Mitchell Brothers' Santa Ana Theatre for one year. The Court finds such a closure is constitutionally impermissible, as constituting a "prior restraint" upon Defendants in violation of the First and Fourteenth Amendments to the United States Constitution. Plaintiff's motion and request is denied.

IV

Judgment for Plaintiff by way of permanent injunction against Defendants as follows:

A. Defendants, directly or indirectly, are permanently enjoined and restrained from engaging in or

performing in Orange County, California, the act of advertising or exhibiting any of the following motion pictures, or any part thereof:

1. Sodom and Gomorrah
2. Behind the Green Door
3. Inside Marilyn Chambers
4. Autobiography of a Flea
5. Sensations
6. Teenage Fantasies
7. Teenage Cruisers
8. Love in Strange Places
9. The Story of Joanna
10. French Classmates
11. Hungry Mouth

B. For a period of 24 months from July 1, 1978, Defendants are ordered to allow officers and employees of the City of Santa Ana free and total access to all parts of the theatre and theatre

premises, upon their request, for the express purpose of monitoring the activity and conduct in and around the theatre, as well as monitoring Defendants' compliance with the orders herein.

C. Prior to July 1, 1978, Defendants James Mitchell and Artie Mitchell are ordered and directed to deposit the sum of $100,000.00 in trust for the City of Santa Ana at the United California Bank, Santa Ana Main Branch, as a security deposit against future attorney fees, costs and expenses incurred by the City of Santa Ana, in connection with any further public nuisance action that the City Council may determine to bring against Defendants in connection with the operation of

their Mitchell Brothers' Santa Ana Theatre. Future lawsuits are defined as any lawsuits filed subsequent to July 1, 1978. Withdrawals from this account to be upon written order of a Judge of the Orange County Superior Court on motion of Plaintiff in said lawsuit, if any, duly supported with evidence in support of the withdrawal, and on the further and express condition that on the merits, a Judge or jury has previously determined that Defendants maintained a public nuisance by exhibiting an obscene motion picture film at the Mitchell Brothers' Santa Ana Theatre and which is involved in said lawsuit. It is further ordered that all interest from this account accrue to the

benefit of Defendants. At the expiration of two (2) years from July 1, 1978, in the event that there is a balance remaining in the account and on motion of Defendants, an Orange County Superior Court Judge, upon determination that no public nuisance lawsuits by Plaintiff are then pending against Defendants in the Orange County Superior Court, may order termination of the account, and any balance paid to the Defendants. Defendants are further ordered to present proof of this deposit with the Court no later than July 10, 1978. Nothing herein is to be construed as a substitute or alternative to any damages that may be awarded the

City by a Judge or jury. Plaintiff is ordered to provide the Bank with a copy of this Order.

D. Upon the Judgment herein becoming final, the following named motion picture film prints declared obscene herein, and now in evidence are ordered destroyed pursuant to Penal Code Section 312, or other applicable law.

DATED: June 6, 1978

/s/ Marvin G. Weeks
Marvin G. Weeks
Judge (Assigned) of
the Superior Court

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ORANGE

PEOPLE OF THE STATE OF CALIFORNIA ex rel KEITH GOW, CITY ATTORNEY OF THE CITY OF SANTA ANA, CALIFORNIA, Plaintiff, vs MITCHELL BROTHERS' SANTA ANA THEATRE, etc., et al, Defendants.	No. 25-65-30 JUDGMENT ON VERDICTS IN OPEN COURT

This action came on regularly for trial on the 11th day of October 1977 in Department 1 Extra Sessions sitting in Departments 18, 37, and 40 of the above entitled court, the Honorable MARVIN G. WEEKS, Judge Assigned, presiding; the plaintiff appearing by attorney JAMES J. CLANCY and the defendants appearing by attorney JOSEPH RHINE.

A jury of 12 persons was regularly

EXHIBIT "A"

impaneled and sworn to try the action. Witnesses on the part of the plaintiff and the defendants were sworn and examined. After hearing the evidence, the arguments of counsel, and instructions of the Court, the jury retired to consider of their verdicts and subsequently returned into Court, and being called answered to their names and duly rendered their verdicts in writing in words and figures as follows, to-wit:

"TITLE OF COURT AND CAUSE," VERDICT

We, the jury in the above-entitled action, find that the motion picture film "Sodom and Gomorrah" is obscene matter taken as a whole, the predominant appeal of which to the average adult person, applying contemporary standards in the State of California is to the prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion; and it is matter which taken

as a whole goes substantially beyond the customary limits of candor in the State of California in the description or representation of such matter; and is matter which taken as a whole is utterly without redeeming social importance. Dated: December 6, 1977. (Signed) Phoebe L. Gantner, Foreman.

"TITLE OF COURT AND CAUSE," VERDICT We, the jury in the above-entitled action, find that the motion picture film "Behind the Green Door" is obscene matter taken as a whole, the predominant appeal of which to the average adult person, applying contemporary standards in the State of California is to the prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion; and it is matter which taken as a whole goes substantially beyond the customary limits of candor in the State of California in the description or representation of such matter; and is matter which taken as a whole is utterly without

redeeming social importance.

Dated: December 6, 1977. (Signed)

Phoebe L. Gantner, Foreman.

"TITLE OF COURT AND CAUSE," VERDICT

We, the jury in the above-entitled action, find that the motion picture film "Inside Marilyn Chambers" is obscene matter taken as a whole, the predominant appeal of which to the average adult person, applying contemporary standards in the State of California is to the prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion; and it is matter which taken as a whole goes substantially beyond the customary limits of candor in the State of California in the description or representation of such matter; and is matter which taken as a whole is utterly without redeeming social importance. Dated: December 6, 1977. (Signed) Phoebe L. Gantner, Foreman.

"TITLE OF THE COURT AND CAUSE," VERDICT We, the jury in the above-entitled action, find that the motion picture film "Autobiography of a Flea" is obscene matter taken as a whole, the predominant appeal of which to the average adult person, applying contemporary standards in the State of California is to the prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion; and it is matter which taken as a whole goes substantially beyond the customary limits of candor in the State of California in the description or representation of such matter; and is matter which taken as a whole is utterly without redeeming social importance. Dated: December 6, 1977. (Signed) Phoebe L. Gantner, Foreman.

"TITLE OF THE COURT AND CAUSE," VERDICT We, the jury in the above-entitled action, find that the motion picture film

"Sensations" is obscene matter taken as a whole, the predominant appeal of which to the average adult person, applying contemporary standards in the State of California is to the prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion; and it is matter which taken as a whole goes substantially beyond the customary limits of candor in the State of California in the description or representation of such matter; and is matter which taken as a whole is utterly without redeeming social importance. Dated: December 6, 1977. (Signed) Phoebe L. Gantner, Foreman.

"TITLE OF THE COURT AND CAUSE," VERDICT We, the jury in the above-entitled action, find that the motion picture film "Teenage Fantasies" is obscene matter taken as a whole, the predominant appeal of which to the average adult person, applying

contemporary standards in the State of California is to the prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion; and it is matter which taken as a whole goes substantially beyond the customary limits of candor in the State of California in the description or representation of such matter; and is matter which taken as a whole is utterly without redeeming social importance. Dated: December 6, 1977. (Signed) Phoebe L. Gantner, Foreman.

"TITLE OF THE COURT AND CAUSE," VERDICT We, the jury in the above-entitled action, find that the motion picture film "Teenage Cruisers" is obscene matter taken as a whole, the predominant appeal of which to the average adult person, applying contemporary standards in the State of California is to the prurient interest, that is, a shameful or morbid interest in nudity

sex or excretion; and it is matter which taken as a whole goes substantially beyond the customary limits of candor in the State of California in the description or representation of such matter; and is matter which taken as a whole is utterly without redeeming social importance. Dated: December 6, 1977. (Signed) Phoebe L. Gantner, Foreman.

"TITLE OF THE COURT AND CAUSE," VERDICT We, the jury in the above-entitled action, find that the motion picture film "Love in Strange Places" is obscene matter taken as a whole, the predominant appeal of which to the average adult person, applying contemporary standards in the State of California is to the prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion; and it is matter which taken as a whole goes substantially beyond the customary limits of candor in

the State of California in the description or representation of such matter; and is matter which taken as a whole is utterly without redeeming social importance. Dated: December 6, 1977. (Signed) Phoebe L. Gantner, Foreman.

"TITLE OF THE COURT AND CAUSE," VERDICT We, the jury in the above-entitled action, find that the motion picture film "The Story of Joanna" is obscene matter taken as a whole, the predominant appeal of which to the average adult person, applying contemporary standards in the State of California is to the prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion; and it is matter which taken as a whole goes substantially beyond the customary limits of candor in the State of California in the description or representation of such matter; and is matter which taken as a whole

is utterly without redeeming social importance. Dated: December 6, 1977. (Signed) Phoebe L. Gantner, Foreman.

"TITLE OF THE COURT AND CAUSE," VERDICT We, the jury in the above-entitled action, find that the motion picture film "Summer of Laura" is not obscene matter taken as a whole, the predominant appeal of which to the average adult person, applying contemporary standards in the State of California is to the prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion; and it is matter which taken as a whole goes substantially beyond the customary limits of candor in the State of California in the description or representation of such matter; and is matter which taken as a whole is utterly without redeeming social importance. Dated: December 6, 1977. (Signed) Phoebe L. Gantner, Foreman.

"TITLE OF THE COURT AND CAUSE," VERDICT We, the jury in the above-entitled action, find that the motion picture film "My Erotic Fantasies" is not obscene matter taken as a whole, the predominant appeal of which to the average adult person, applying contemporary standards in the State of California is to the prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion; and it is matter which taken as a whole goes substantially beyond the customary limits of candor in the State of California in the description or representation of such matter; and is matter which taken as a whole is utterly without redeeming social importance. Dated: December 6, 1977. (Signed) Phoebe L. Gantner, Foreman.

"TITLE OF THE COURT AND CAUSE," VERDICT We, the jury in the above-entitled action, having heretofore found that the

following motion picture films is/are obscene as defined by law: (Name of Film) 1. Sodom & Gomorrah 2. Behind the Green Door 3. Inside Marilyn Chambers 4. Autobiography of a Flea 5. Sensations 6. Teen Age Fantasies 7. Teenage Cruisers 8. French Classmates 9. Love in Strange Places 10. Story of Joanna Further find that the showing of said film at the Mitchell Brothers Santa Ana Theatre located at 1565 West 17th Street, Santa Ana, California, constitutes, and constituted a public nuisance as defined by law, for the following period or periods: (Dates) September 3, 1975 thru January 15, 1976 January 23, 1976 thru February 19, 1976 April 2, 1976 thru May 6, 1976 May 21, 1976 thru June 3, 1976 September 1, 1976 thru November 11, 1976 January 19, 1977 thru February 1, 1977 February 16, 1977 thru April 12, 1977 Dated: December 6, 1977

(Signed) Phoebe L. Gantner, Foreman.

"TITLE OF THE COURT AND CAUSE," VERDICT We, the jury in the above-entitled action, find that motion picture film "One of a Kind" is not obscene matter taken as a whole, the predominant appeal of which to the average adult person, applying contemporary standards in the State of California is to the prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion; and it is matter which taken as a whole goes substantially beyond the customary limits of candor in the State of California in the description or representation of such matter; and is matter which taken as a whole is utterly without redeeming social importance. Dated: December 7, 1977. (Signed) Phoebe L. Gantner, Foreman.

"TITLE OF THE COURT AND CAUSE," VERDICT We, the jury in the above-entitled action, find that the motion picture film

"Roller Babies" is not obscene matter taken as a whole, the predominant appeal of which to the average adult person, applying contemporary standards in the State of California is to the prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion; and is matter which taken as a whole goes substantially beyond the customary limits of candor in the State of California in the description or representation of such matter; and is matter which taken as a whole is utterly without redemming social importance. Dated: December 7, 1977. (Signed) Phoebe L. Gantner, Foreman.

"TITLE OF THE COURT AND CAUSE," VERDICT We, the jury in the above-entitled action, find that the motion picture film "French Class Mates" is obscene matter taken as a whole, the predominant appeal of which to the average adult person, applying

contemporary standards in the State of California is to the prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion and it is matter which taken as a whole goes substantially beyond the customary limits of candor in the State of California in the description or representation of such matter; and is matter which taken as a whole is utterly without redeeming social importance. Dated: December 7, 1977. (Signed) Phoebe L. Gantner, Foreman.

"TITLE OF THE COURT AND CAUSE," VERDICT We, the jury in the above-entitled action, find that the motion picture film "Hungry Mouth" is obscene matter taken as a whole, the predominant appeal of which to the average adult person, applying contemporary standards in the State of California is to the prurient interest, that is, a shameful or morbid interest in nudity, sex

or excretion; and it is matter which taken as a whole goes substantially beyond the customary limits of candor in the State of California in the description or representation of such matter; and is matter which taken as a whole is utterly without redeeming social importance. Dated: December 7, 1977. (Signed) Phoebe L. Gantner, Foreman.

"TITLE OF THE COURT AND CAUSE," VERDICT We, the jury in the above-entitled action, having heretofore found that the following motion picture films is/are obscene as defined by law: (Name of Film) 1. French Classmates 2. Hungry Mouth Further find that the showing of said film at the Mitchell Brothers Santa Ana Theatre located at 1565 West 17th Street, Santa Ana, California, constitutes, and constituted a public nuisance as defined by law, for the following period or periods: (Dates) March

9, 1977 to March 15, 1977 November 24, 1976 to December 21, 1976 Dated: December 7, 1977. (Signed) Phoebe L. Gantner, Foreman.

"TITLE OF THE COURT AND CAUSE," VERDICT (DAMAGES) We the Jury in the above entitled action find for the plaintiff herein and assess the amount of nominal and/or actual or compensatory damages against the defendant or defendants indicated for each period of public nuisance which we have previously determined to have been maintained at the Mitchell Brothers' Santa Ana Theatre as follows:

	From	Through
1.	9-3-75	1-15-76

Defendant(s)

a. Mitchell Brothers' Santa Ana Theatre

b. Cinema 7, Inc.

c. M.B.F.G. Theatre Circuit, Inc.

From Through

1. (Continued)

d. Demich, Inc.

e. Mitchell Brothers Film Group

f. James Mitchell

g. Artie Mitchell

Nominal Damages: $ Ø

Compensatory Damages: $ 27,000-

2. 1-23-76 2-19-76

Defendant(s)

a. Mitchell Brothers' Santa Ana Theatre

b. Cinema 7, Inc.

c. M. B. F. G. Theatre Circuit, Inc.

d. Demich, Inc.

e. Mitchell Brothers' Film Group

f. James Mitchell

g. Artie Mitchell

Nominal Damages: $ Ø

Compensatory Damages: $ 5,600-

	From	Through
3.	4-2-76	5-6-76

Defendant(s)

a. Mitchell Brothers' Santa Ana Theatre

b. Cinema 7, Inc.

c. M B F G Theatre Circuit, Inc.

d. Demich, Inc.

e. Mitchell Brothers' Film Group

f. James Mitchell

g. Artie Mitchell

Nominal Damages: $ Ø

Compensatory Damages: $ 7,000-

4.	5-21-76	6-3-76

Defendant(s)

a. Mitchell Brother' Santa Ana Theatre

b. Cinema 7, Inc.

c. M.B.F.G. Theatre Circuit Inc.

From Through

4. (Continued)

d. Demich, Inc.

e. Mitchell Brothers' Film Group

f. James Mitchell

g. Artie Mitchell

Nominal Damages: $ Ø

Compensatory Damages: $ 2,800-

5. 9-1-76 11-11-76

Defendant(s)

a. Mitchell Brothers Santa Ana Theatre

b. Cinema 7, Inc.

c. M. B. F. G. Theatre Circuit, Inc.

d. Demich, Inc.

e. Mitchell Brothers' Film Group

f. James Mitchell

g. Artie Mitchell

Nominal Damages: $ Ø

Compensatory Damages: $ 14,400-

	From	Through
6.	1-19-77	2-1-77

Defendant(s)

a. Mitchell Brothers Santa Ana Theatre

b. Cinema 7, Inc.

c. M. B. F. G. Theatre Circuit, Inc.

d. Demich, Inc.

e. Mitchell Brothers Film Group

f. James Mitchell

g. Artie Mitchell

Nominal Damages: $ Ø

Compensatory Damages: $ 2,800-

7.	2-16-77	4-12-77

Defendant(s)

a. Mitchell Brothers' Santa Ana Theatre

b. Cinema 7, Inc.

c. M. B. F. G. Theatre Circuit, Inc.

From	Through

7. (Continued)

   d. Demich, Inc.

   e. Mitchell Brothers Film Group

   f. James Mitchell

   g. Artie Mitchell

   Nominal Damages: $ Ø

   Compensatory Damages: $ 9,800-

8. 3-9-77 3-15-77

   Defendant(s)

   a. Mitchell Brothers Santa Ana Theatre

   b. Cinema 7, Inc.

   c. M.B.F.G. Theatre Circuit, Inc.

   d. Demich, Inc.

   e. Mitchell Brothers Film Group

   f. James Mitchell

   g. Artie Mitchell

From Through

8. (Continued)

Nominal Damages: $ Ø

Compensatory Damages: $ 1,400-

9. 11-24-76 12-21-76

Defendant(s)

a. Mitchell Brothers Santa Ana Theatre

b. Cinema 7, Inc.

c. M B F G Theatre Circuit, Inc.

d. Demich, Inc.

e. Mitchell Brothers Film Group

f. James Mitchell

g. Artie Mitchell

Nominal Damages: $ Ø

Compensatory Damages: $ 5,600-

TOTAL NOMINAL DAMAGES: $

TOTAL COMPENSATORY DAMAGES: $ 76,400-

We further find by a preponderance of the

evidence that the following named defendants were not guilty of oppression, fraud or actual malice in maintaining the public nuisances heretofore determined by us, and assess against each of said defendants and in favor of plaintiff an additional amount as exemplary or punitive damages for the sake of example and by way of punishment as follows:

	Defendant(s)	Amount
1.	Mitchell Brothers' Santa Ana Theatre	$ None
2.	Cinema 7, Inc.	$ None
3.	M. B. F. G. Theatre Circuit, Inc.	$ None
4.	Demich, Inc.	$ None
5.	Mitchell Brothers Film Group	$ None
6.	James Mitchell	$ None
7.	Artie Mitchell	$ None
	Total Exemplary Damages:	$ None

Dated: January 5, 1978 (Signed)
Phoebe Gantner, Foreman

WHEREFORE, by virtue of the law, and by reason of the premises aforesaid, it is ordered, adjudged, and decreed that said plaintiff PEOPLE OF THE STATE OF CALIFORNIA ex rel KEITH GOW, CITY ATTORNEY OF THE CITY OF SANTA ANA, CALIFORNIA, have and recover from defendants Mitchell Brothers' Santa Ana Theatre; Cinema 7, Inc.; M.B.F.G. Theatre Circuit, Inc.; Demich, Inc.; Mitchell Brothers Film Group; James Mitchell; and Artie Mitchell, jointly and severally, as and for compensatory damages, the sums of $27,000.00 for the period September 3, 1975 through January 15, 1976; $5,600.00 for the period January 23, 1976 through February 19, 1976; $7,000.00 for the period April 2, 1976 through May 6, 1976; $2,800.00 for the period May 21, 1976 through June 3, 1976; $14,400.00 for the period September 1, 1976

through November 11, 1976; $2,800.00 for the period January 19, 1977 through February 1, 1977; $9,800.00 for the period February 16, 1977 through April 12, 1977; $1,400.00 for the period March 9, 1977 through March 15, 1977; and $5,600.00 for the period November 24, 1976 through December 1976; for a total sum of $76,400.00 with interest thereon at the rate of seven per cent per annum from the date of the verdict until paid together with costs and disbursements amounting to the sum of $_____.

Judgment prepared by: Floy Ray

ORDINANCE NO. NS-1287

AN ORDINANCE OF THE CITY OF SANTA ANA ADDING SECTIONS 12-100 THROUGH 12-105 TO THL SANTA ANA MUNICIPAL CODE DECLARING THE COMMERCIAL EXPLOITATION OF PATENTLY OFFENSIVE SEXUAL CONDUCT IN LEWD FILMS AND THEATRES EXHIBITING THE SAME TO BE A PUBLIC NUISANCE AND ORDERING THEIR ABATEMENT

THE CITY COUNCIL OF THE CITY OF SANTA ANA DOES ORDAIN AS FOLLOWS:

SECTION 1: That the Santa Ana Municipal Code is hereby amended by adding a section, to be numbered 12-100, which said section reads as follows:

Sec. 12-100. Purpose and Effect. The City Council finds that the

EXHIBIT "B"

crass commercial exploitation of explicit sexual conduct through the public exhibition of lewd films constitutes a debasement and distortion of a sensitive key relationship of human existence, central to family life, community welfare and the development of human personality; is indecent and offensive to the senses and interferes with the comforable enjoyment of life and property, in that such interferes with the interest of the public in the quality of life and total community environment, the tone of commerce in the City, property values, and the public safety; and that the continued operation of such activities is detrimental to the best health, safety, convenience, good morals and general welfare of the City of Santa Ana, and of the residents, citizens, inhabitants and businesses thereof. Pursuant to §§ 38771, 38773 and 38773.5 of the Government Code,

§ 731 of the Code of Civil Procedure, and §§ 3479, 3480, 3491 and 3494 of the Civil Code, the City Council hereby declares such activities to be a public nuisance, and herein establishes procedures for the abatement thereof. This ordinance shall apply to existing establishments which are presently engaged in the type of activity herein declared to be a public nuisance.

SECTION 2: That the Santa Ana Municipal Code is hereby amended by adding a section, to be numbered 12-101, which said section reads as follows:

Sec. 12-101. Definitions.

(A) "Lewd Film" means any motion picture film:

(1) which the average person, applying contemporary community standards, would find, when considered as a whole, appeals to the prurient interest; and

(2) which depicts or describes patently offensive representations or descriptions of:

(a) ultimate sexual acts, normal or perverted, actual or simulated; or

(b) masturbation, excretory functions, or lewd exhibition of the genitals or genital area.

Nothing herein contained is intended to include or proscribe any film which, when considered as a whole, and in the context in which it is used, possesses serious literary, artistic, political or scientific value.

(B) "Place" includes, but is not limited to, any building, structure or place, or any separate part or portion thereof, whether permanent or not, or the ground itself.

(C) "Motion picture film" shall include any:

(1) film or plate negative;

(2) film or plate positive;

(3) film designed to be projected on a screen for exhibition;

(4) films, glass slides or transparencies, either in negative or positive form designed for exhibition by projection on a screen.

(D) "Person" means any individual, partnership, firm, association, corporation, or other legal entity.

(E) "Knowledge" means having knowledge of the contents and character of the patently offensive sexual conduct which appears in such lewd film.

SECTION 3: That the Santa Ana Municipal Code is hereby amended by adding a section, to be numbered 12-102, which said section reads as follows:

Sec. 12-102. Lewd Films and Theatres Exhibiting

the Same Declared
a Public Nuisance;
Abatement Thereof.

(A) Any and every place in the City of Santa Ana where:

(1) lewd films are publicly exhibited as a regular course of business, or possessed for the purpose of such exhibition; or

(2) a lewd film is publicly and repeatedly exhibited, or possessed for the purpose of such exhibitions, is a public nuisance.

(B) Any and every lewd film which is publicly exhibited or possessed for such purpose in the City of Santa Ana is a public nuisance per se.

(C) From and after service on the theatre, or its manager, or acting manager, or person then in charge of such place, of a certified copy of this

ordinance and a cerified copy of the Resolution and order of summary abatement provided for in Section 12-103 hereof, all moneys paid thereafter as admission price to such exhibitions are also declared to be a public nuisance, as personal property used in conducting and maintaining a declared public nuisance.

(D) Upon receiving notice through service of a certified copy of this ordinance and of a cerified copy of the Resolution and order of summary abatement provided for in Section 12-103 hereof, any and every person who shall own, legally or equitably, lease, maintain, maanage, conduct, or operate a place in the City of Santa Ana which is declared to be a public nuisance as set forth and stated in Subsection (A) of this Section 12-102 is deemed to be a person who has knowledge of such nuisance for the purpose of this

ordinance and is, thereafter, responsible for its maintenance, and shall be liable thereof.

(E) The places and subject matter declared to be public nuisances under Subsections (A) through (C) of this section shall be abated pursuant to Government Code §§ 38773 and 38773.5, Code of Civil Procedure §731, and Civil Code §§ 3491 and 3494, as provided for herein.

SECTION 4: That the Santa Ana Municipal Code is hereby amended by adding a section, to be numbered 12-103, which said section reads as follows:

Sec. 12-103. Action to be Taken by City Council.

Upon a specific finding that a public nuisance, as defined in Section 12-102 hereof, exists in the City of Santa Ana, the City Council, in applying the provisions of this ordinance to such nuisance,

shall provide for the following by Resolution:

(A) Declare the fact that such nuisance exists.

(B) Set forth the description or legal description and street address of the real property which constitutes the nuisance.

(C) Set forth the evidentiary facts considered by the City Council in arriving at its factual determination that a lewd film or films, as defined in Section 12-101(A) hereof, are publicly exhibited or possessed for exhibition at such real property and are public nuisances as declared herein, including a recitation of the particular sexual conduct and acts which the City Council finds are patently offensive.

(D) Order all persons named in Section 12-102 (D) hereof to summarily abate

such public nuisances immediately, by terminating the exhibitions of such lewd film or films, or causing the same to be terminated, and voluntarily surrendering possession of the same to the court having jurisdiction of the legal proceedings brought by the City Attorney, pursuant to Sections 12-103 (E) and 12-105 of this ordinance, and notifying the City Clerk and City Council of compliance therewith by sworn affidavit, as authorized by Government Code § 38773, and as ordered by the action of the City Council in such resolution.

(E) Order the City Attorney to proceed as directed in Section 12-105 hereof and do all the things directed therein and do all things necessary to abate such public nuisance through judicial proceedings and to conclude such proceedings as expeditiously as is permissible under the law, including requesting the court to advance such

proceedings on the calendar of the court.

(F) Inform and give notice to persons named in Section 12-102(D) that:

(1) The City Council has determined that a public nuisance presently exists at such place and address, and that, under Section 12-102 (D) hereof, they are deemed to have knowledge thereof and are responsible therefor.

(2) The City Council has ordered the City Attorney, as provided for under Section 12-105 hereof, to commence legal proceedings naming such persons as defendants in a civil action to abate the same judicially under Civil Code § 3494 and Code of Civil Procedure § 731, as a supplemental remedy to the summary abatement process, authorized by Government Code § 38773 and ordered by the City Council in Section 12-103 hereof and that under subsections (A) and (B) of Sec. 12-104, the costs of

abatement of such civil abatement action filed under Civil Code § 3494 and Code of Civil Procedure §731, including investigative costs, court costs, attorney's fees, and other expenses, are made a special assessment against the parcel of land upon which such nuisance is being maintained and, upon their determination in such court action, will, by separate ordinance, be made a lien against such property and a personal obligation against the theatre operator and property owner.

(3) All films being used in conducting and maintaining such public nuisance are contraband and the subject of forfeiture.

(4) From and after service on the theatre or its manager or acting manager, or person then in charge of such place, of a certified copy of this ordinance and a certified copy of such Resolution any and all moneys paid as admission price to

such exhibitions are a public nuisance, as personal property used in conducting and maintaining such nuisance and, as such, are the subject of forfeiture.

(G) Order that a certified copy of said Resolution and a certified copy of this ordinance be delivered in any manner normally used to effectuate personal service of process as directed in Code of Civil Procedure §§ 415.10 through 416.90, to all persons of record having any legal or equitable interest in the real property, and to the regular or acting manager or persons in charge of the place therein declared a public nuisance.

SECTION 5: That the Santa Ana Municipal Code, is hereby amended by adding a section, to be numbered 12-104, which said section reads as follows:

Sec. 12-104. Action brought Pursuant to Civil

Code §§3494, et al.; Forfeiture to the General Fund of the City, Cost of Abatement; Manner of Collection.

(A) Upon judgment against the operators of the theatre in legal proceedings brought pursuant to Civil Code §§ 3491 and 3494, and Code of Civil Procedure §731, an accounting shall be made by such defendant or defendants of all moneys received by them which have been declared to be a public nuisance under Section 12-102 (C) of this ordinance. Such moneys or their equivalent shall be forfeited to the general fund of the City of Santa Ana.

(B) The cost of abatement shall include the following:

(1) investigative costs.

(2) court costs.

(3) reasonable attorney's fees arising out of the preparation for, and trial of the cause, and appeals therefrom.

(4) printing costs of trial and appellate briefs, and all other papers filed in such proceedings.

Such cost of abatement is hereby made a special assessment against the parcel of land upon which such nuisance is maintained. Upon its determination in a civil action under Civil Code §3494 and Code of Civil Procedure § 731, such shall, by special ordinance, be made a lien against such property and a personal obligation against the theatre operator and property owner and shall be collected at the same time and in the same manner as ordinary municipal taxes are collected, and shall be subject to the same penalties

and the same procedure and sale in the case of delinquency as provided for ordinary municipal taxes. All laws, applicable to the levy, collection and enforcement of municipal taxes, shall be applicable to such special assessment.

SECTION 6: That the Santa Ana Municipal Code, is hereby amended by adding a section, to be numbered 12-105, which said section reads as follows:

Sec. 12-105. Action to be Taken by City Attorney.

Upon a specific finding by Resolution of the City Council of the fact that a public nuisance exists at a particular location, the City Attorney shall:

(A) Not later than ten days after passage of said resolution, commence legal proceedings under Civil Code §§ 3491 and 3494 and Code of Civil Procedure § 731, by the filing of a civil action seeking

the following relief:

(1) A Declaratory Judgment that the motion picture or pictures named by the City Council are lewd films.

(2) A Declaratory Judgment that the films found to be lewd are public nuisances under this ordinance and such Resolution.

(3) A Declaratory Judgment that the place named by the City Council where the film or films are being exhibited is a public nuisance under this ordinance and such Resolution.

(4) An accounting of all moneys paid as admission price to the operators of the theatre from and after the time the persons maintining said nuisance receive notice of the finding by the City Council that the public nuisance exists, and a Declaratory Judgment that such moneys are a public nuisance under this

ordinance.

(5) An Order that all admission price moneys derived from the showing of the named lewd film or films and enumerated in the Court ordered accounting be forfeited to the general fund of the City of Santa Ana as contraband.

(6) An injunction enjoining and restraining all persons guilty of maintaining said nuisance from exhibiting in public the named lewd films at any time in the future in the City of Santa Ana.

(7) An Order that all positive prints of the named lewd films be forfeited as contraband under this ordinance.

(8) Judgment for the City of Santa Ana for all costs therein expended, including investigative costs, court costs, reasonable attorney's fees, and such other expenses as are provided for herein.

(9) All other relief as

the Court may deem proper.

(B) File a notice of the pendency of the action in the office of the County Recorder of the County of Orange, pursuant to Code of Civil Procedure § 409, giving the names of the parties, the object of the action, and a description of the property thereby affected.

SECTION 7: If any section, subsection, sentence, clause, phrase or portion of this ordinance is for any reason held to be invalid or unconstitutional by the decision of any court of competent jurisdiction, such decision shall not affect the validity of the remaining portions of this ordinance. The City Council of the City of Santa Ana hereby declares that it would have adopted this ordinance and each section, subsection, sentence, clause, phrase or portion thereof irrespective of the fact that any one or more

sections, subsections, clauses, phrases or portions be declared invalid or unconstitutional.

SECTION 8: Neither the adoption of this ordinance nor the repeal hereby of any ordinance shall in any manner affect the prosecution for violation of ordinances, which violations were committed prior to the effective date hereof, nor be construed as affecting any of the provisions of such ordinance relating to the collection of any such license or penalty or the penal provisions applicable to any violation thereof, nor to affect the validity of any bond or case deposit in lieu thereof, required to be posted, filed or deposited pursuant to any ordinance and all rights and obligations thereunder appertaining shall continue in full force and effect.

SECTION 9: The Clerk of the Council shall certify to the passage and

adoption of this ordinance and shall cause the same to be published in the official newspaper of the City of Santa Ana within fifteen (15) days after its adoption.

SECTION 10: This ordinance shall take effect upon posting or publication, whichever is earlier.

PASSED AND ADOPTED by the City Council of the City of Santa Ana at its regular meeting held on the 19th day of January, 1976.

ATTEST:

ORIGINAL SIGNED BY

JOHN GARTHE

MAYOR

ORIGINAL SIGNED BY

FLORENCE I. MALONE

CLERK OF THE COUNCIL

STATE OF CALIFORNIA)

COUNTY OF ORANGE) ss.

CITY OF SANTA ANA)

I, FLORENCE I. MALONE, do hereby certify that I am the Clerk of the Council of the City of Santa Ana; that the foregoing Ordinance was introduced to said Council at its regular meeting held on the 5th day of January, 1976, and was again considered by said Council at its regular meeting held on the 19th day of January, 1976, and was at said meeting passed and adopted by the following vote, to wit:

AYES, COUNCILMEN: Yamamoto,
Evans,
Bricken,
Ortiz,
Garthe,
Brandt,
Ward

NOES, COUNCILMEN: None

ABSENT, COUNCILMEN: None

ORIGINAL SIGNED BY

FLORENCE I. MALONE

CLERK OF THE COUNCIL

APPROVED AS TO FORM:

/s/ Keith L. Gow

KEITH L. GOW, CITY ATTORNEY

THE FOREGOING INSTRUMENT IS A FULL TRUE, AND CORRECT COPY OF THE ORIGINAL ON FILE IN THIS OFFICE.

ATTEST: October 20 1977

FLORENCE I. MALONE

CLERK OF THE COUNCIL,

CITY OF SANTA ANA

(SEAL)

FLORENCE I. MALONE

BY /s/ MARTHA E. LEA

DEPUTY

ORDINANCE NO. NS-1325

AN EMERGENCY ORDINANCE OF THE CITY OF SANTA ANA AMENDING SECTIONS 12-101 THROUGH 12-105 OF THE SANTA ANA MUNICIPAL CODE DECLARING THE COMMERCIAL EXPLOITATION OF PATENTLY OFFENSIVE SEXUAL CONDUCT IN LEWD FILMS AND THEATRES EXHIBITING THE SAME TO BE A PUBLIC NUISANCE AND ORDERING THEIR ABATEMENT.

THE CITY COUNCIL OF THE CITY OF SANTA ANA DOES ORDAIN AS FOLLOWS:

SECTION 1: That section 12-101 of the Santa Ana Municipal Code is hereby amended to read as follows:

Sec. 12-101. Definitions.

(A) "Lewd Film" means any motion picture film:

(1) which the average person, applying contemporary community standards, would find, when considered as a whole, appeals to the prurient interest;

and

(2) which depicts or describes patently offensive representations or descriptions; of

(a) ultimate sexual acts, normal or perverted, actual or simulated; or

(b) masturbation, excretory functions, or lewd exhibition of the genitals or genital area.

Nothing herein contained is intended to include or proscribe any film which, when considered as a whole, and in the context in which it is used, possesses serious literary, artistic, political or scientific value.

(B) "Place" includes, but is not limited to, any building, structure or place, or any separate part or portion thereof, whether permanent or not, or the ground itself.

(C) "Motion picture film" shall include any:

(1) film or plate negative;

(2) film or plate positive;

(3) film designed to be projected on a screen for exhibition;

(4) films, glass slides or transparencies, either in negative or positive form designed for exhibition by projection on a screen.

(5) video tape or any other medium used to electronically reproduce images on a screen.

(D) "Person" means any individual, partnership, firm, association, corporation, or other legal entity.

(E) "Knowledge" means having knowledge of the contents and character of the patently offensive sexual conduct which appears in such lewd film.

SECTION 2: That section 12-102

of the Santa Ana Municipal Code is hereby amended to read as follows:

Sec. 12-102. Lewd Films and Theatres Exhibiting the Same Declared a Public Nuisance; Abatement Thereof.

(A) Any and every place in the City of Santa Ana where:

(1) lewd films are publicly exhibited as a regular course of business, or possessed for the purposes of such exhibition; or

(2) a lewd film is publicly and repeatedly exhibited, or possessed for the purpose of such exhibition, is a public nuisance.

(B) Any and every lewd film which is publicly exhibited or possessed for such purpose at a place which is a public nuisance under this section, is a public

nuisance per se.

SECTION 3: That section 12-103 of the Santa Ana Municipal Code is hereby amended to read as follows:

Sec. 12-103. Knowledge of Nuisance Presumed From Service of Copy of Resolution; Responsibility of Parties Therefor; Abatement of Such Nuisance.

(A) Upon receiving notice through service of a certified copy of this ordinance and of a certified copy of the Resolution provided for herein, any and every person who shall own, legally or equitably, lease, maintain, manage, conduct, or operate a place in the City of Santa Ana which is declared to be a public nuisance as set forth and stated in Subsection

(A) of Section 12-102 is deemed to be a person who has knowledge of such nuisance for the purpose of this ordinance and is, thereafter, responsible for its maintenance, and shall be liable therefor.

(B) The places and subject matter declared to be public nuisances under section 12-102 hereof shall be abated pursuant to Government Code sections 38773 and 38773.5, Code of Civil Procedure section 731, and Civil Code sections 3491 and 3494, as provided for herein.

SECTION 4: That section 12-104 of the Santa Ana Municipal Code is hereby amended to read as follows:

Sec. 12-104. Action to be Taken by City Council.

Upon a specific finding that a public nuisance, as defined in Section 12-102 hereof, exists in the City of Santa Ana, the City Council, in applying the provisions

of this ordinance to such nuisance, shall provide for the following by Resolution:

(A) Declare the fact that such nuisance exists;

(B) Set forth the description or legal description and street address of the real property which constitutes the nuisance;

(C) Set forth a statement of facts upon which the City Council declaration of nuisance is based;

(D) Order the revocation of all licenses and permits which have been issued as a part of the operation of such business, subject to confirmation by the Court in the judicial proceedings required herein. Criminal proceedings for transacting business without a license at such address shall not be filed until the order of license revocation by the City Council has been confirmed by judicial order;

(E) Order all persons named in Section 12-103 (A) hereof to summarily abate such public nuisances immediately, by terminating the exhibitions of such lewd film or films, or causing the same to be terminated, and voluntarily surrendering possession of the same to the court having jurisdiction of the legal proceedings brought by the City Attorney, pursuant to the provisions of this ordinance, and notifying the City Clerk and City Council of compliance therewith by sworn affidavit;

(F) Order the City Attorney to proceed as directed in Section 12-105 hereof and do all things necessary to abate such public nuisance through judicial proceedings and to conclude such proceedings as expeditiously as is permissible under the law;

(G) Inform and give notice to persons named in Section 12-103 (A) that:

(1) The City Council has determined that a public nuisance presently exists at such place and address, and has revoked the licenses and permits at that place, subject to Court confirmation, and that, under Section 12-103 (A) hereof, they are deemed to have knowledge thereof and are responsible therefor;

(2) The City Council has ordered the City Attorney, as provided for under Section 12-105 hereof, to commence legal proceedings naming such persons as defendants in a civil action to abate the same judicially under Civil Code section 3494 and Code of Civil Procedure section 731, and to seek recovery in said action of the costs of abatement, including investigative costs, Court costs, attorney's fees, and other expenses;

(3) All lewd motion picture films being used in conducting and

maintaining such public nuisances are considered to be contraband and the subject of forfeiture; and

(4) From and after service on the place or its manager or acting manager, or person then in charge of such place, of a certified copy of this ordinance and a certified copy of such Resolution, any and all moneys paid as admission price to or for the exhibition or exhibitions of such lewd motion picture films are considered to be a public nuisance, as personal property used in conducting and maintaining such nuisance and, that a forfeiture of the same will be requested in the judicial proceedings required herein.

(H) Order that a certified copy of said Resolution and a certified copy of this ordinance be delivered forthwith in any manner normally used to effectuate personal service of process as directed

in Code of Civil Procedure sections 415.10 through 416.90, to all persons of record having any legal or equitable interest in the real property, and to the regular or acting manager or persons in charge of the place therein declared a public nuisance.

SECTION 5: That section 12-105 of the Santa Ana Municipla Code is hereby amended to read as follows:

Sec. 12-105. Action to be Taken by City Attorney.

Upon a specific finding by Resolution of the City Council of the fact that a public nuisance exists at a particular location, the City Attorney shall:

(A) Forthwith, but not later than five working days after passage of said Resolution, commence legal proceedings under Civil Code sections 3491 and 3494 and Code of Civil Procedure section 731, by the filing of a civil action seeking

the following relief:

(1) An Order that the motion picture or pictures named by the City Council are lewd, as defined herein;

(2) An Order that the place named by the City Council where the film or films are being exhibited is a public nuisance and that the action taken by the City Council to revoke the licenses issued to that place of business was lawful;

(3) An injunction enjoining and restraining all persons maintaining said nuisance from exhibiting in public the named lewd films at any time in the future in the City of Santa Ana;

(4) An Order that all positive prints of the named lewed films be forfeited as contraband;

(5) An accounting of all moneys paid as admission price to or for the exhibition or exhibitions of such lewd

motion picture films, from and after the time the persons maintaining said nuisance receive a copy of the Resolution of the City Council finding that a public nuisance exists, and a judgment that such moneys are a public nuisance;

(6) An Order that all admission price moneys or valuable consideration received and enumerated in the Court ordered accounting be forfeited to the general fund of the City of Santa Ana as contraband, or as property belonging to the City of Santa Ana;

(7) Judgment for the City of Santa Ana for all costs expended in abating the public nuisance, including investigative costs, Court costs, reasonable attorney's fees, and such other expenses as are provided for herein; and

(8) All other relief as the Court may deem proper.

(B) File a notice of the pendency of the action in the office of the County Recorder of the County of Orange, pursuant to Code of Civil Procedure section 409, giving the names of the parties, the object of the action, and a description of the property thereby affected.

SECTION 5: If any section, subsection, sentence, clause, phrase or portion of this ordinance is for any reason held to be invalid or unconstitutional by the decision of any court of competent jurisdiction, such decision shall not affect the validity of the remaining portions of this ordinance. The City Council of the City of Santa Ana hereby declares that it would have adopted this ordinance and each section, subsection, sentence, clause, phrase or portion thereof irrespective of the fact that any one or more sections, subsections, clauses, phrases or portions

be declared invalid or unconstitutional.

SECTION 6: This Ordinance amends those sections of the Santa Ana Municipal Code which were established by Ordinance No. NS-1287, adopted on January 5, 1976. The adoption of this Ordinance shall not in any manner affect the prosecution for violations of Ordinance No. NS-1287, which violations were committed prior to the effective date of this Ordinance.

SECTION 7: URGENCY CLAUSE.

Pursuant to the provisions of Subsection (b) of section 36937 of the Government Code of the State of California, this Ordinance is for the immediate preservation of the public peace, health, and safety and shall take effect immediately. The facts constituting the urgency are as follows:

The purpose of this Ordinance, as is evident from its content,

is to enable the City of Santa Ana to abate the type of public nuisance being committed within the City. The City Council deems the showing of lewd films, as defined herein, as being a public nuisance contrary to the public peace, health and safety of the City and its residents. This Ordinance makes certain changes in previously adopted and effective Ordinance NS-1287 required by the decision of the California Court of Appeal in People ex rel. Camil v. Buena Vista Cinema, 129 Cal. Rptr. 315. The City Council deems it necessary for the immediate preservation of the public peace, health and safety that immediate action be taken to abate said

public nuisance pursuant to the terms of this Ordinance.

Adopted this 4th day of October, 1976, by the following vote:

AYES, COUCILMEN: Yamamoto, Bricken, Ortiz, Garthe, Evans, Brandt, Ward

NOES, COUNCILMEN: None

ABSENT, COUNCILMEN: None

/s/ John Garthe

MAYOR

Adopted as a regular ordinance the 26th day of October, 1976, by the following vote:

AYES, COUNCILMEN: Yamamoto,

Ward, Ortiz,
Garthe

NOES, COUNCILMEN: Brandt

ABSENT, COUNCILMEN: Bricken,
Evans

/s/ John Garthe

MAYOR

ATTEST:

/s/ Florence I. Malone

CLERK OF THE COUNCIL

APPROVED AS TO FORM:

/s/ Keith L. Gow

KEITH L. GOW, CITY ATTORNEY

THE FOREGOING INSTRUMENT IS A FULL, TRUE, AND CORRECT COPY OF THE ORIGINAL ON FILE IN THIS OFFICE.

ATTEST: Nov. 2, 1976
FLORENCE I. MALONE,
CLERK OF THE COUNCIL,
CITY OF SANTA ANA
(SEAL)

FLORENCE I. MALONE
BY /s/ MARTHA E. LEA
DEPUTY

RESOLUTION NO. 76-134

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF SANTA ANA DETERMINING THAT THE REAL PROPERTY AND ACTIVITY KNOWN AS THE MITCHELL BROTHERS' SANTA ANA THEATER, LOCATED AT 1565 WEST 17TH STREET, SANTA ANA, CALIFORNIA, IS IN VIOLATION OF ORDINANCE NS 1325 OF THE CITY OF SANTA ANA; DECLARING SUCH ACTIVITY TO BE A PUBLIC NUISANCE, REVOKING ALL LICENSES AND PERMITS, AND ORDERING ABATEMENT; AND ORDERING THE CITY ATTORNEY TO TAKE ALL STEPS NECESSARY TO COMPLY WITH SECTION 12-105 OF THE SANTA ANA MUNICIPAL CODE.

BE IT RESOLVED by the City

EXHIBIT "D"

Council of the City of Santa Ana:

Section 1. Pursuant to Section 38771 of the Government Code which authorizes the City Legislative Body to declare by Ordinance what constitutes a nuisance, the City Council of Santa Ana did, on the 5th day of January, 1976, adopt Ordinance No. NS-1287 which became effective on the 18th day of February, 1976, and did supersede the same with Ordinance No. NS 1325, adopted as an urgency Ordinance on the 4th day of October, 1976, to become effective immediately upon adoption. Said Ordinance declares:

A. Any and every place in the City of Santa Ana where: (1) lewd films are publicly exhibited as a regular course of business, or possessed for the purpose of such exhibition; or (2) a lewd film is publicly and repeatedly exhibited, or possessed for the purpose of such

exhibition, to be a public nuisance.

B. Any and every lewd film which is publicly exhibited or possessed for such purpose at a place which is a public nuisance under (A) above, to be a public nuisance per se.

C. From and after service on the place, or its manager, or acting manager, or person then in charge of such place, or a certified copy of Ordinance No.NS 1325, and a certified copy of the Resolution authorized by said Ordinance, all moneys paid thereafter as admission price to such exhibitions are also a public nuisance, as personal property used in conducting and maintaining a declared public nuisance.

D. Upon receiving notice through service of a certified copy of Ordinance NS.1325 and of a certified copy of the Resolution authorized by said Ordinance, any and every person who shall own,

legally or equitably, lease, maintain, manage, conduct, or operate a place in the City of Santa Ana where lewd films are publicly exhibited, or possessed for the purpose of such exhibition in the regular course of business, or where a single lewd film is publicly and repeatedly exhibited, or possessed for the purpose of such exhibition, is deemed to be a person who has knowledge of such nuisance for purposes of said Ordinance and this Resolution and is, thereafter, responsible for its maintenance, and shall be liable therefor.

Section 2. Pursuant to the provisions of Ordinance NS.1325, the City Council of Santa Ana makes the following findings of fact concerning the identity of the motion picture films which have been and are being exhibited at the "Mitchell Brothers' Santa Ana Theater":

A. Upon the instructions of

the Santa Ana City Attorney, a continuous surveillance of the films being exhibited at the "Mitchell Brothers' Santa Ana Theater" has been maintained, which surveillance shows that, during the ten-month period from November 28, 1975 through September 1976, approximately 13 programs have been exhibited at said theater with each program containing one or more motion picture films. The titles of the films exhibited at each of the 13 programs and the approximate playing date of each is set forth in Enclosure A to this Resolution.

B. Photographic time-motion studies of the 26 motion picture films and previews exhibited at the "Mitchell Brothers' Santa Ana Theater" during the ten-month period from November 28, 1975 through September 1976, being programs 1 through 13 described in Enclosure A, have been prepared and have been filed with the City

Council, and the members of the City Council have examined the photographic content in each of such time-motion studies.

Section 3. Pursuant to the provisions of Ordinance NS. 1325, and based upon the evidentiary facts referred to in Section 2 above, the City Council of Santa Ana makes the following findings of fact concerning the character and nature of the aforementioned motion picture films which have been, and are being, exhibited at the "Mitchell Brothers' Santa Ana Theater":

A. Each of the aforementioned 26 motion picture films and previews which have been exhibited at the "Mitchell Brothers' Santa Ana Theater" as a part of programs 1 through 13, is a lewd film as defined in Section 12-101 of the Santa Ana Municipal Code, in that (1) the average person, applying contemporary community standards, would find that, when considered

as a whole, said film appeals to the prurient interest, and (2) said film depicts and describes patently offensive representations and descriptions of ultimate sexual acts, and (3) said film possesses no serious literary, artistic, political, or scientific value. The patently offensive representations and descriptions which are referred to are depicted on the individual photographs of the above described time-motion studies which have been examined by the City Council, and such studies are incorporated herein by reference.

Section 4. All licenses and permits which have been issued as a part of the operation of the "Mitchell Brothers' Santa Ana Theater" are hereby revoked, subject to confirmation by the Court, in judicial proceedings required herein. Criminal proceedings for transacting

business without a license at the "Mitchell Brothers' Santa Ana Theater" shall not be filed until the order of license revocation by the City Council has been confirmed by judicial order.

Section 5. Pursuant to the provisions of Ordinance NS. 1325, and based upon evidentiary facts contained in the business records of the City of Santa Ana and other evidence on file with the City Council in matters pertaining to the "Mitchell Brothers' Santa Ana Theater", which are incorporated herein by reference as though set forth herein in full, the City Council of Santa Ana makes the following findings of fact with respect to the place commonly known as the "Mitchell Brothers' Santa Ana Theater":

A. There is presently located in the City of Santa Ana a motion picture business commonly known as the "Mitchell

Brothers' Santa Ana Theater" doing business upon real property known as 1565 West 17th Street, Santa Ana, County of Orange, California, being:

That portion of Lot 3 of the Mabury Tract, in the City of Santa Ana, County of Orange, State of California, as per map recorded in Book 165, Page 301 of the Deeds, Records of Los Angeles County, California, described as follows:

Beginning at a point North 0° 48' 00" East 367.72 feet from the Southwest corner of that certain parcel of land described in Parcel 1 of the Deed recorded May 7, 1953 in Book 2499, Page 293 of Official Records, records of said Orange County, said

point of beginning being on the Westerly line of above mentioned parcel of land; thence North 0° 48' 00" East 250.00 feet continuing along said Westerly line; thence North 89° 49' 00" East 90.00 feet, leaving said Westerly line; thence South 0° 48' 00" 250.00 feet; thence South 89° 49' 00" West 90.00 feet to the point of beginning.

B. The motion picture business commonly known as the "Mitchell Brothers' Santa Ana Theater" located at 1565 West 17th Street, Santa Ana, California, is a public nuisance, being a place where lewd films are publicly exhibited, and possessed for the purpose of such exhibition, as a regular course of business.

C. United Artists Theatres, Inc., 172 Golden Gate Avenue, San Francisco,

California 94102, is the Lessee of the real property commonly known as "Mitchell Brothers' Santa Ana Theater".

D. JOHN DOE 1 is the sub-lessee or assignee of the principle lease of the real property commonly known as the "Mitchell Brothers' Santa Ana Theater", 1565 West 17th Street, Santa Ana, California.

E. Allison Honer Co., a Partnership, P.O. Box 84, Santa Ana, California 92702, is the owner of the real property commonly known as "Mitchell Brothers' Santa Ana Theater", located at 1565 West 17th Street, Santa Ana, California.

F. Bank of America National Trust and Savings Association, a National Banking Association, is the owner of a security interest in such real property, as shown on the Trust Deed recorded on September 10, 1965 in Book 7660, Page 155,

Official Records.

G. M.B.F.G. Theatre Circuit, Inc., is the holder of a business license issued by the City of Santa Ana, for the operation of the business conducted upon the real property commonly known as the "Mitchell Brothers' Santa Ana Theater", 1565 West 17th Street, Santa Ana, California.

H. JOHN DOE 2 is the operator, JOHN DOE 3 is the manager, and JOHN DOE 4 is the acting manager or person in charge of the establishment commonly known as the "Mitchell Brothers' Santa Ana Theater", located at 1565 West 17th Street, Santa Ana, California.

Section 6. United Artists Theaters, Inc., Allison Honer Co., a Partnership, Bank of America National Trust and Savings Association, M.B.F.G. Theater Circuit, Inc., and JOHN DOES 1 through 4, and

all other persons of record, having legal or equitable title in the real property known as 1565 West 17th Street, Santa Ana, California, on which is located the motion picture business commonly known as the "Mitchell Brothers' Santa Ana Theater" are:

A. hereby informed and given notice that (1) the City Council has determined that a public nuisance exists on the property located at 1565 West 17th Street, Santa Ana, California; namely, the "Mitchell Brothers' Santa Ana Theater" and that, under Section 12-103 of the Santa Ana Municipal Code, they are responsible therefor upon receiving notice through service of a certified copy of the Ordinance and a certified copy of this Resolution, and (2) any and all licenses and permits heretofore issued for the premises known as 1565 West 17th Street, Santa Ana, California, are hereby revoked under the

provisions set forth in Section 12-104 (D) of the Santa Ana Municipal Code; and

B. hereby ordered, under Government Code Section 38773 and Section 12-104(E) of the Santa Ana Municipal Code, to summarily abate the abovementioned public nuisances immediately, by terminating, or causing to be terminated, the exhibition of the abovedescribed lewd films and to voluntarily surrender possession of the same to the Court having jurisdiction of the legal proceedings which the City Attorney has been ordered to institute under Section 12-105 of the Santa Ana Municipal Code. Each of the abovementioned persons shall notify the City Council of Santa Ana by sworn affidavit of him compliance with this Order of Summary Abatement, as required by Section 12-104(E) of the Santa Ana Municipal Code.

Section 7. United Artists

Theaters, Inc., Allison Honer Co., a Partnership, Bank of America National Trust and Savings Association, M.B.F.G. Theater Circuit, Inc., and JOHN DOES 1 through 4, and all other persons of record, having legal or equitable title in the real property known as 1565 West 17th Street, Santa Ana, California, on which is located the motion picture business commonly known as the "Mitchell Brothers' Santa Ana Theater", are hereby informed and given notice that:

A. under Sections 12-104(F) and 12-105 of the Santa Ana Municipal Code, the City Attorney has been ordered to institute legal proceedings under Civil Code Sections 3491 and 3494, and Civil Procedure Code Section 731, naming them as defendants in an action to abate the same, and to seek restitution for the costs of abatement, including:

(1) investigative costs;

(2) Court costs;

(3) reasonable attorney's fees arising out of preparations for and trial of the cause, and appeals therefrom; and

(4) printing costs of trial and appellate briefs and all other papers filed in such proceedings.

B. All positive prints of the abovedescribed 26 lewd films and previews are considered to be contraband and the subject of forfeitures as provided for in Section 12-104 (G)(3) of the Santa Ana Municipal Code.

C. From and after service on the place or its manager, or acting manager, or person then in charge of such place, of a certified copy of Ordinance NS. 1325, and a certified copy of this Resolution, any and all moneys paid thereafter as admission price to the exhibition of such

lewd films are considered to be a public muisance as personal property used in conducting and maintaining such nuisances, and that a forfeiture of the same and other admission fees will be requested in the judicial proceedings required by Ordinance No. .

Section 8.

A. The City Attorney is hereby ordered to provide for delivery of a certified copy of this Resolution and a certified copy of Ordinance NS 1325 in any manner normally used to effectuate personal service of process as directed in Code of Civil Procedure, Section 415.10 through 416.90 to United Artists Theaters, Inc., Allison Honer Co., a Partnership, and JOHN DOES 1 through 6, and to all other persons of record having any legal or equitable interest in the real property, known as 1565 West 17th Street, Santa Ana, California,

on which is located the motion picture business commonly known as the "Mitchell Brothers' Santa Ana Theater", and to the manager or acting manager or persons in charge of said establishment.

B. The City Attorney is hereby ordered to proceed as directed in Section 12-105 of the Santa Ana Municipal Code, and to take all steps and do all things necessary to abate such nuisances and obtain the relief designated therein, through the judicial proceedings specified therein.

ADOPTED this 26th day of October, 1976, by the following vote:

AYES,	COUNCILMEN:	Yamamoto, Brandt, Ortiz, Ward
NOES,	COUNCILMEN:	None
ABSENT,	COUNCILMEN:	Bricken, Evans

ABSTAINED, COUNCILMEN: Garthe

ATTEST: /s/ John Garthe

MAYOR

/s/ Florence I. Malone

CLERK OF THE COUNCIL

APPROVED AS TO FORM:

/s/ Keith L. Gow

KEITH L. GOW

CITY ATTORNEY

THE FOREGOING INSTRUMENT IS A FULL, TRUE, AND CORRECT COPY OF THE ORIGINAL ON FILE IN THIS OFFICE.

ATTEST: Nov. 2 1976

FLORENCE I. MALONE,

CLERK OF THE COUNCIL,

CITY OF SANTA ANA

(SEAL)

FLORENCE I. MALONE

BY /s/ MARTHA E. LEA

DEPUTY

PROGRAM		FEATURE	DATE
1	1)	Sodom & Gomorrah	11/28/75
	2)	Behind the Green Door	11/29/75
	3)	Resurrection of Eve	
2	1)	Anyone But My Husband	1/22/76
	2)	Previews: "The Milk Lady" "Beneath the Mermaids"	
	3)	"Lady on the Couch"	
3	1)	Inside Marilyn Chambers	1/28/76
	2)	Previews	
	3)	The Fireworks Woman	
4	1)	Mash'd	2/24/76
	2)	Previews	
	3)	Sexteen	
5	1)	The Milk Lady	3/10/76
	2)	Previews: "Story of	

		Joanna" "Summer of Laura"	
	3)	The Milk Maid	
6	1)	Beneath the Mermaids	3/23/76
	2)	Previews: "Story of Joanna" "Summer of Laura" "Sip of Wine"	
	3)	A Touch of Genie	
7	1)	"The Story of Joanna"	4/03/76
	2)	Previews: "Sip the Wine" and "Carnal Heaven"	
	3)	Short Feature "Tattoo"	
	4)	Previews: "C.B. Momma"	
8	1)	Previews "Defiance"	6/02/76
	2)	Sip the Wine"	
	3)	"Teenage Fantasies"	

9	1)	Previews: "Carnal Heaven"	6/08/76
	2)	Honeymoon Sweet	
	3)	The Defiance	
10	1)	"Carnal Heaven"	6/21/76
	2)	Previews	
	3)	"Love, Lust & Violence"	
11	1)	Coming atts: "Bang, Bang"	7/06/76
	2)	"The Summer of Laura"	
	3)	"Anyone But My Husband"	
12	1)	Married Woman	8/16/76
	2)	One of a Kind	
13	1)	Autobiography of a Flea (Only Feature)	9/05/76

(ENCLOSURE A-1)

APPENDIX C

(Reference: Petition at 24,
25, fn. 4
49,
50,
57,
59.)

Findings of Fact and Conclusions of Law of Trial Judge, filed June 6, 1978.

.....C-1 Thru C-33

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ORANGE

PEOPLE OF THE STATE OF CALIFORNIA ex rel. KEITH GOW, CITY ATTORNEY OF THE CITY OF SANTA ANA, CALIFORNIA,

Plaintiff,

vs.

MITCHELL BROTHERS' SANTA ANA THEATER, located at 1565 West 17th Street, Santa Ana, County of Orange, California; M.B.F.G. THEATRE CIRCUIT, INC.; JIM GISH; ALLISON HONER CO., a Partnership; UNITED ARTISTS THEATRE CIRCUIT, INC.; CONTINENTAL AUXILIARY COMPANY, a California Corporation; BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, a National Banking Association; JAMES MITCHELL; ARTIE MITCHELL; DEMICH, INC., a California

No. 25-65-30

FINDINGS OF FACT AND CONCLUSIONS OF LAW

FILED
June 6, 1978
WILLIAM E. ST JOHN, County Clerk
By _____ Deputy

Corporation; CINEMA 7, INC., a California Corporation; DOES 1 through 100, inclusive,

Defendants.

This action came on regularly for trial on October 11, 1977, in Department 1, extra sessions sitting in Department 18, 37 and 40 of the above-entitled Court, the Honorable Marvin G. Weeks the Judge assigned, Presiding, the Plaintiff appearing by attorney James J. Clancy, and the Defendants appearing by Joseph Rhine, and the Court on October 17, 1977, having ordered a jury trial on the issues of "obscenity", "public nuisance" and "damages", to precede determination of the equitable issues of imposition of a constructive trust on Defendants' box office receipts, revocation of Defendants' business license and permits, and closure of Defendants' theater; and a jury of twelve persons having been

regularly impaneled and sworn to try the issues of "obscenity", "public nuisance" and "damages", and having heretofore returned his verdicts on said issues; and thereafter on January 4 and 5, 1978, the Court having heard and considered oral arguments by both counsel on the equitable issues of imposition of a constructive trust on Defendants' box office receipts, revocation of Defendants' business licenses and permits, and closure of Defendants' theater; the Court also having reread and considered applicable portions of Plaintiffs and Defendants' trial briefs pertaining to these issues and the Court having granted leave to both counsels to submit written arguments and supplemental points and authorities on the issues; and the Court having received, read, and considered said written arguments, and points and authorities, and the matter having been

duly submitted to the Court for its decision; and the Court having heretofore filed its Memorandum of Opinion; and Plaintiff having requested written Findings of Fact and Conclusion of Law and has heretofore prepared and served and filed said proposed Findings and Conclusions; and the Defendants having duly filed objections thereto; and the matter having been set for hearing to settle said Findings and Conclusions; and said hearing having been had and the Court having settled said Findings and Conclusions now makes its Final Findings of Fact and Conclusions of Law as follows:

FINDINGS OF FACT

IT IS TRUE THAT:

I.

Pursuant to Plaintiff's motion Defendant Jim Gish has been dismissed as a

party to this action.

II.

Pursuant to written stipulation by and between the Plaintiff and the Defendants Allison Honer Company, a Partnership; Continental Auxiliary Company, a California Corporation; Bank of America National Trust and Savings Association, a National Banking Association; and United Artists Theatre Circuit, Inc.; a Maryland Corporation it was agreed that the above-mentioned Defendants need not appear and defend the cause of action herein which was originally set for trial on June 6, 1977; and that any judgment rendered against any Defendant other than those mentioned above would be without prejudice to the above-mentioned Defendants and would have no binding force or effect upon the cause of action which Plaintiff has alleged against the above-mentioned Defendants.

III.

The Defendants have admitted that in December of 1974 Defendants M.B.F.G. Theatre Circuit, Inc., a California Corporation, and Demich, Inc., a California Corporation, merged into the Defendant Cinema 7, Inc., a California Corporation, to form one corporate entity bearing the name Cinema 7, Inc., a California Corporation.

IV.

Defendant Cinema 7, Inc., is a sublessee of the real property commonly known as "Mitchell Brothers' Santa Ana Theater".

V.

Defendants James Mitchell and Defendant Artie Mitchell, were at all times relevant to this action, the sole owners of Defendant Corporation Cinema 7, Inc., of which each owns 50% of the stock, and the Defendant general partnership, Mitchell Brothers Film Group, in which said persons are

co-partners, and are beneficially interested in the income, profits and financial successes of said corporation at said general partnership and have dominated, influenced, and controlled the business and affairs of said corporation and said partnership at all times relevant hereto.

VI.

In September of 1975 the Defendants became the operators of the theater located at 1565 West 17th Street, in the City of Santa Ana, California, under a sublease from United Artists Theatre Circuit, Inc. Since taking over operation of the theater Defendants have operated the same as an "adult" theater, specializing in sexually explicit films, and continued to operate it as such under the name "Mitchell Brothers' Santa Ana Theater".

VII.

The Mitchell Brothers' Santa Ana

Theater, a motion picture house, is a commercial venture and a place of public accommodation.

VIII.

On January 5, 1976, the City Council of the City of Santa Ana duly passed and adopted Santa Ana Ordinance No. N.S. 1287. Thereafter, Ordinance No. N.S. 1287 was amended by the City Council of the City of Santa Ana in Ordinance No. N.S. 1325.

IX.

Ordinance No. N.S. 1325 was passed on October 4, 1976, and became effective thirty days thereafter.

X.

On October 26, 1976, the City Council of the City of Santa Ana passed and adopted Resolution No. 76-134.

XI.

Ordinance N.S. 1325 was purportedly passed and adopted as an emergency

ordinance on October 4, 1976 and purportedly adopted as a regular ordinance on October 26, 1976. However, on this issue the Court finds specifically that due to defects in the emergency clause of the Ordinance that the said Ordinance did not become effective until thirty days after October 4, 1976 and the purported act of adopting the said Ordinance as a regular Ordinance on October 26, 1976 had no force or legal effect.

XII.

On November 2, 1976, the within action was filed by the City Attorney for the City of Santa Ana at the direction of the City Council of the City of Santa Ana under Ordinances No. N.S. 1287, N.S. 1325 and Code of Civil Procedure Section 731. The Complaint and certified copies of Ordinance No. N.S. 1287, N.S. 1325 and Resolution No. 76-134 were duly served on the Defendants in November, 1976.

XIII.

The time-motion studies of the 26 motion picture films and previews which were examined by the Santa Ana City Council pursuant to its purported action in Council Resolution 76-134 or the same time and motion studies which were admitted in evidence in the trial court as Plaintiff's Exhibit 2A - 14, inclusive, and also appear in photographically reduced form, as Exhibits 1 - 13 to the first amended and supplemental complaint filed and served on or about June 6, 1977.

XIV.

The following motion picture films and previews, designated as "programs 1-24", were shown, on the following dates and in the following number of days, at the Mitchell Brothers' Santa Ana Theater:

PROGRAM	FEATURE	DATE EXHIBITED	NO. OF DAYS
1	Sodom & Gomorrah	9/03/75-01/15/76	135

PROGRAM	FEATURE	DATE EXHIBITED	NO. OF DAYS
1	Behind the Green Door Resurrection of Eve		
2	Anyone But My Husband Previews: "The Milk Lady, "Beneath the Mermaids" Lady on the Couch	01/16/76-01/22/76	7
3	Inside Marilyn Chambers Previews Fireworks Woman	1/23/76-2/19/76	28
4	Mash'd Previews Sexteen	02/20/76-03/04/76	14
5	The Milk Lady Previews: "Story of Joanna", "Summer of Laura" The Milk Maid	03/05/76-03/18/76	14
6	Beneath the Mermaids Previews:	03/19/76-04/01/76	14

PROGRAM	FEATURE	DATE EXHIBITED	NO. OF DAYS
6	"Story of Joanna", "Summer of Laura", "Sip the Wine" A Touch of Genie		
7	The Story of Joanna Previews: "Sip the Wine", "Carnal Haven" Short Feature "Tattoo" Previews: "C.B. Momma"	04/02/76-05/06/76	35
7(a)	The Milk Lady C.B. Mommas	05/07/76-05/20/76	14
8	Previews: "Defiance" Sip the Wine Teenage Fantasies	05/21/76-06/03/76	14
9	Previews: "Carnal Haven" Honeymoon Sweet The Defiance	06/04/76-06/17/76	14
10	Carnal Haven	06/18/76-07/04/76	17

PROGRAM	FEATURE	DATE EXHIBITED	NO. OF DAYS
10	Previews Love, Lust & Violence		
11	Coming Atts: "Bang, Bang" Summer of Laura Anyone But My Husband	07/05/76- 08/05/76	32
12	Married Woman One of a Kind	08/06/76- 08/31/76	26
13	Autobio- graphy of a Flea (Only Feature)	09/01/76- 10/04/76	34
14	Story of Joanna Autobiography of a Flea	10/04/76- 10/17/76	14
15	Autobio- graphy of a Flea Sodom & Gomorrah	10/18/76- 11/11/76	25
16	Oriental Blue Teenage Nurses	11/12/76- 11/23/76	12
17	Hungry Mouth My Erotic Fantasies	11/24/76- 12/21/76	18
18	Carnal Haven Previews Her Last Fling	12/25/76- 01/18/77	25

PROGRAM	FEATURE	DATE EXHIBITED	NO. OF DAYS
19	Sweet Punkin Love in Strange Places Previews: "Sensations", "Kinkorama", "Code Name", Oriental Treatment" Sweet Punkin, I Love You	01-19-77- 02/01/77	14
20	When A Woman Calls Previews: "Sensations", "Kinkorama", "Code Name", "Oriental Treatment" Night Pleasures	02/02/77- 02/15/77	14
21	Sensations Previews: "Roller-babies", "French Playmates", "Autobiography of a Flea", "Sodom & Gomorrah" Kinkorama Previews: "Candy Lips", "Code Name", "Oriental Treatment", "Teenage Cruisers"	02/16/77- 03/08/77	21
22	French Classmates Previews Roller Babies	03/09/77- 03/15/77	7
23	Sodom & Gomorrah	03/16/77- 03/29/77	14

PROGRAM	FEATURE	DATE EXHIBITED	NO. OF DAYS
23	Previews Autobiography of a Flea		
24	Teenage Cruisers Previews High School Fantasies	03/30/77- 04/12/77	14

XV.

During the course of this trial, the following motion picture films were personally viewed:

(a) Sodom and Gomorrah

(b) Resurrection of Eve

(c) Behind the Green Door

(d) Inside Marilyn Chambers

(e) C.B. Mommas

(f) Autobiography of a Flea

(g) Sensations

(h) Teenage Fantasies

(i) Teenage Cruisers

(j) One of a Kind

(k) Rollerbabies

(l) French Classmates

(m) Love in Strange Places

(n) Hungry Mouth

(o) The Story of Joanna

(p) The Summer of Laura

(q) My Erotic Fantasies

XVI.

Between September 3, 1975 and April 12, 1977 (the dates in issue in this case) Defendants exhibited at their theater described herein, approximately forty-one full-length sexually explicit movie films and additional previews of coming attractions, which were also sexually explicit. The Court personally viewed seventeen of the forty-one films, as well as the twenty-four "time and motion" studies, which were not considered by the jury in the obscenity and nuisance issues, and while the Court does not now rule on the obscene nature of the twenty-four films portrayed in the

"time and motion" studies, it does consider the totality of the evidence and circumstances, in reaching its findings herein.

XVII.

All the film found obscene by the jury and personally viewed by the Court exhibited the basest type of obscenity as it is generally thought of by the average decent, moral person as well as obscenity as defined by law, dominated by oral copulation, sodomy, masturbation, homosexualism, lesbianism, group sex, portrayed incest, and portrayed rape, the licking of sperm from the bodies of the actors, the smearing of sperm on the face. There were, however, no animals involved and no violence. In one picture, an adult actress was portrayed as a child, but generally speaking, no children were involved. As to the twenty four "time and

motion" studies, it would be a restrained description to call them "sexually explicit".

XVIII.

The Defendants are engaged in the commercial exploitation of obscene motion picture film. Illustrative of this fact is that Defendants grossed from the Mitchell Brothers' Santa Ana Theater alone $403,405.75 during the period September 3, 1975 to April 12, 1977.

XIX.

The Court accepts the testimony of Plaintiff's expert Dr. Anchell that the exhibition of obscene films at a neighborhood theater was harmful to the community generally, and the testimony of Plaintiff's expert Dr. Van den Haag that knowledge that obscene films were being exhibited at a neighborhood theater was particularly harmful to persons under the age of twenty-four

whose sexual views had not yet matured, and that such harm did occur in the case due to the close proximity of Santa Ana College, a church and a kindergarten across the street from Defendants' theater and due to the fact Defendants advertise their "adult" movies on a large marquee in the parking lot across from the college.

XX.

Exhibition of the eleven films found obscene herein was made possible by a positive print of the films through which a light source from a motion picture projector is passed and which carries images from such positive print that it projects the same onto the screen of said motion picture theater.

XXI.

Ordinance No. N.S. 1287 passed and adopted on January 5, 1976 contains no provision for license revocation. Ordinance

No. N.S. 1325 which amends N.S. 1287 to include a provision for license revocation did not become effective as an emergency ordinance on October 4, 1976 (see Finding XI above). On October 26, 1976 and pursuant to the purported emergency ordinance or its purported adoption as a regular ordinance Resolution No. 76-134 was adopted purportedly revoking all licenses and permits theretofore issued for the premises known as 1565 West 17th Street, Santa Ana, California, subject to judicial confirmation.

XXII.

Ordinance No. N.S. 1325 contains no expression of retroactive application.

XXIII.

On October 26, 1976, when Resolution No. 76-134 was adopted, the only facts presented to the City Council as justification for the license revocation were alleged acts occuring prior to the effective date

of Ordinance N.S. 1325.

XXIV.

The Defendants and each of them were not guilty of negligence, accident, mistake, undue influence or violation of any trust in their conduct as applicable to the issue of an involuntary constructive trust under Civil Code Section 2224.

XXV.

The Defendants, and each of them, had prior and continuing knowledge of the sexually explicit character of the films, shown at the Mitchell Brothers' Santa Ana Theater, and that said films contained sexual activity in the form of ultimate sexual acts, normal or perverted, actual or simulated, or lewd exhibition of the genitals.

From the foregoing Findings of Fact, the Court concludes as follows:

CONCLUSIONS OF LAW

I.

This action was brought at the direction of the Santa Ana City Council and was authorized by Code of Civil Procedure Section 731.

II.

The City Attorney has standing to bring this action of public nuisance against the Defendants by virtue of Code of Civil Procedure Section 731 and to assert therein the remedy of constructive trust.

III.

The Defendant James Mitchell and the Defendant Artie Mitchell, were at all times relevant to this action, principals and sole owners of the Defendant Corporation Cinema 7, Inc., and the Defendant general partnership, Mitchell Brothers Film Group, and as such general partners are jointly

and severally liable for the acts of such partnership and corporation.

IV.

Based upon the Court's personal viewing, each of the following motion picture films named below constitute subject matter which is obscene beyond a reasonable doubt, as the term "obscene" is defined in Penal Code Section 311(a):

(a) Sodom and Gomorrah

(b) Behind The Green Door

(c) Inside Marilyn Chambers

(d) Autobiography of a Flea

(e) Sensations

(f) Teenage Fantasies

(g) Teenage Cruisers

(h) French Classmates

(i) Love in Strange Places

(j) Story of Joanna

(k) Hungry Mouth

V.

The Mitchell Brothers' Santa Ana Theater is a commercial venture and place of public accommodation, and is subject to regulation by the State.

VI.

The positive prints used to project the images in the obscene films enumerated in Conclusion IV. which have been received in evidence in this case are unlawful subject matter and contraband as to which no property rights may be acquired.

VII.

The following ordinance provisions and City Council's actions taken pursuant thereto, constitute constitutionally prohibited "prior restraints" and "censorship":

N.S. 1287, Section 12-103(c)

N.S. 1325, Section 12-104(c)

N.S. 1287, Section 12-103(d)

N.S. 1325, Section 12-104(e)

N.S. 1287, Section 12-103(f)(3)

N.S. 1325, Section 12-104(g)(3)

VIII.

Chapter 21 of the Santa Ana Municipal Code, under which the Mitchell Brothers' Santa Ana Theater license was issued, is a licensed ordinance which has as its sole purpose the raising of revenue, and is not a regulatory ordinance.

IX.

Since there is no expression of retroactive application in Ordinance No. N.S. 1325 said Ordinance must be given prospective application only.

X.

Construing Ordinance No. N.S. 1325 as being regulatory in nature, the action taken by the City Council pursuant thereto in Resolution No. 76-134 was not predicated upon any conduct occurring after the effective date of Ordinance No. N.S. 1325 and

such action revoking all license issued as part of the operations of the Mitchell Brothers' Santa Ana Theater was not a valid revocation of said license to do business.

XI.

The maintenance of a public nuisance by the showing of an obscene film does not constitute a "wrongful act" as contemplated by the statutes authorizing the imposition of the remedy of constructive trust and Plaintiff is not entitled to the remedy of constructive trust on Defendants' box office receipts.

XII.

The beneficiary of any constructive trust, if imposed in this case, would be the people of the State of California, who suffer loss or harm from the public nuisances which have been created. Said Plaintiff is not a person "who would

otherwise have had it" or an "injured party" as those terms are construed in ascertaining the proper beneficiary of a constructive trust under Civil Code Section 2224.

XIII.

The imposition of a constructive trust on the box office receipts of the eleven films found to be obscene by the jury would constitute double recovery for the same wrong in view of the fact that the jury awarded the Plaintiff compensatory damages in the sum of $76,400.00.

XIV.

No constructive trust lies in this case because (1) there is no conviction of a "wrongful act" which is usually a crime, (2) there is no underlying instrument in existence which would have taken effect except for the imposition of a constructive trust that was not within the

contemplation of the parties to the instrument (3) there is no beneficiary thereof who would be an "injured party" by being a "person who otherwise have had" the proceeds of the trust, which in the case of an obscenity abatement action against a film theater could only be the customers who paid admission, (4) the trust, if any, could only be imposed upon proceeds from films which are shown after they have been adjudged obscene.

XV.

Defendants should be permanently enjoined and restrained from engaging in or performing in Orange County, California, the act of advertising or exhibiting any of the following motion picture films, or any part thereof:

1. Sodom and Gomorrah
2. Behind The Green Door
3. Inside Marilyn Chambers

4. Autobiography of A Flea
5. Sensations
6. Teenage Fantasies
7. Teenage Cruisers
8. Love In Strange Places
9. The Story of Joanna
10. French Classmates
11. Hungry Mouth

XVI.

Under the facts in this case; namely, that the Defendants are engaged in the commercial exploitation of obscene motion picture films and have for a substantial period of time in the past and as a continuing and regular course of conduct exhibited sexually explicit films depicting oral copulation, sodomy, masturbation, homosexuality, lesbianism, group sex, portrayed incest, portrayed rape, the licking of sperm from the bodies of the actors and smearing of sperm on the face,

and have admitted their intention to continue to show the same similarly sexually explicit films in the future, the abatement remedy of closing the defendants' theater for a period of time would otherwise constitute a proper and suitable equitable remedy except for the law expressed in People ex rel. Busch v. Projection Room Theater (1976), 17 Cal. 3d 42, 58 that such closure is prohibited by the Constitution of the United States as a prior restraint.

XVII.

Plaintiff is entitled to further equitable relief; namely, for a period of 24 months from July 1, 1978, Defendants should be ordered to allow officers and employees of the City of Santa Ana free and total access to all parts of the theater and theater premises, upon their request, for the express purpose of monitoring Defendants' compliance with the orders

herein. Further, prior to July 1, 1978, Defendants James Mitchell and Artie Mitchhell should be ordered and directed to deposit the sum of $100,000.00 in trust for the City of Santa Ana at the United California Bank, Santa Ana Main Branch, as a security deposit against future attorney fees, costs, and expenses incurred by the City of Santa Ana, in connection with any further public nuisance action that the City Council may determine to bring against Defendants in connection with the operation of their Mitchell Brothers' Santa Ana Theater. Future lawsuits are defined as any lawsuits filed subsequent to July 1, 1978. Withdrawals from this account to be upon written order of a Judge of the Orange County Superior Court on motion of Plaintiff in said lawsuit, if any, duly supported with evidence in support of the withdrawal, and on the further and express

condition that on the merits, a Judge or jury has previously determined that Defendants maintained a public nuisance by exhibiting an obscene motion picture film at the Mitchell Brothers' Santa Ana Theater and which is involved in said lawsuit. All interest from this account should accrue to the benefit of Defendants. At the expiration of two (2) years from July 1, 1978, in the event that there is a balance remaining in the account and on motion of Defendants, an Orange County Superior Court Judge, upon determination that no public nuisance lawsuits by Plaintiff are then pending against Defendants in the Orange County Superior Court, may order termination of the account, and any balance paid to the Defendants. Defendants should present proof of this deposit with the Court no later than July 10, 1978. Nothing herein is to be construed as a substitute or

alternative to any damages that may be awarded the City by a Judge or Jury.

XVIII.

That at such time as the Judgment herein becomes final, the eleven motion picture films set forth in Conclusion XV above should be destroyed pursuant to Penal Code Section 312, or other applicable law.

Let Judgment be entered accordingly.

DATED: June 6, 1978

Marvin G. Weeks /s/
Marvin G. Weeks, Judge

APPENDIX D

(Reference: Petition at pg. 24.)

"Judgment After Trial By Court", filed by Trial Judge Marvin Weeks on June 6, 1978.

.....D-1 Thru D-11.

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ORANGE

PEOPLE OF THE STATE OF CALIFORNIA ex rel. KEITH GOW, CITY ATTORNEY OF THE CITY OF SANTA ANA, CALIFORNIA,

Plaintiff,

vs.

MITCHELL BROTHERS' SANTA ANA THEATER, located at 1565 West 17th Street, Santa Ana, County of Orange, California; M.B.F.G. THEATRE CIRCUIT, INC.; JIM GISH; ALLISON HONER CO., a Partnership; UNITED ARTISTS THEATRE CIRCUIT, INC.; CONTINENTAL AUXILIARY COMPANY, a California Corporation; BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, a National Banking Association; JAMES MITCHELL: ARTIE MITCHELL; DEMICH, INC., a California

No. 25-65-30

JUDGMENT AFTER TRIAL BY COURT

FILED
June 6, 1978
WILLIAM E. ST JOHN, County Clerk
By _____ Deputy

Corporation; CINEMA 7, Inc., a California Corporation; DOES 1 through 100, inclusive,

Defendants.

This action came on regularly for trial on October 11, 1977, in Department 1, extra sessions sitting in Department 18, 37 and 40 of the above-entitled Court, the Honorable Marvin G. Weeks the Judge assigned, Presiding, the Plaintiff appearing by attorney James J. Clancy, and the Defendants appearing by Joseph Rhine, and the Court on October 17, 1977, having ordered a jury trial on the issues of "obscenity", "public nuisance" and "damages", to precede determination of the equitable issues of imposition of a constructive trust on Defendants' box office receipts, revocation of Defendants' business license and permits, and closure of Defendants' theater; and a jury of twelve persons having been

regularly impaneled and sworn to try the issues of "obscenity", "public nuisance" and "damages", and having heretofore returned his verdicts on said issues; and thereafter on January 4 and 5, 1978, the Court having heard and considered oral arguments by both counsel on the equitable issues of imposition of a constructive trust on Defendants' box office receipts, revocation of Defendants' business licenses and permits, and closure of Defendants' theater; the Court also having reread and considered applicable portions of Plaintiff's and Defendants' trial briefs pertaining to these issues; and the Court having granted leave to both counsels to submit written arguments and supplemental points and authorities on the issues; and the Court having received, read, and considered said written arguments, and points and authorities, and the matter having been

duly submitted to the Court for its decision; and the Court having heretofore filed its Amended Memorandum of Opinion; and Plaintiff having requested written Findings of Fact and Conclusions of Law and has heretofore prepared and served and filed said proposed Findings and Conclusions; and the Defendants having duly filed objections thereto; and the matter having been set for hearing to settle said Findings and Conclusions; and said hearing having been had and the Court having settled said Findings and Conclusions and filed its Final Findings of Fact and Conclusions of Law as follows, now renders its Judgment as follows:

IT IS ORDERED, ADJUDGED AND DECREED that Defendants have Judgment on issue of constructive trust. Plaintiff's prayer, request and motion to impose a constructive trust on Defendants' box office receipts

for the period September 3, 1975 to April 12, 1977 is denied.

IT IS ORDERED, ADJUDGED AND DECREED that Defendants have Judgment on the issue of Defendants' license revocation. Plaintiff's prayer, request and motion to confirm and approve the action of the City Council in Resolution 76-134 dated October 26, 1976, revoking all Defendants' licenses and permits is denied.

IT IS ORDERED, ADJUDGED AND DECREED that Defendants have Judgment on the issue of closure of Defendants' Mitchell Brothers' Santa Ana Theatre for one year. The Court finds such a closure is constitutionally impermissible, as constituting a "prior restraint" upon Defendants in violation of the First and Fourteenth Amendments to the United States Constitution. Plaintiff's motion and request is denied.

IT IS ORDERED, ADJUDGED AND DECREED

that Plaintiff have Judgment against the Defendants by way of permanent injunction against Defendants as follows:

A. Defendants, directly or indirectly, are permanently enjoined and restrained from engaging in or performing in Orange County, California, the act of advertising or exhibiting any of the following motion pictures, or any part thereof:

1. Sodom and Gomorrah
2. Behind the Green Door
3. Inside Marilyn Chambers
4. Autobiography of a Flea
5. Sensations
6. Teenage Fantasies
7. Teenage Cruisers
8. Love in Strange Places
9. The Story of Joanna
10. French Classmates

11. Hungry Mouth

B. For a period of 24 months from July 1, 1978, Defendants are ordered to allow officers and employees of the City of Santa Ana free and total access to all parts of the theatre and theatre premises, upon their request, for the express purpose of monitoring the activity and conduct in and around the theatre, as well as monitoring Defendants' compliance with the orders herein.

C. Prior to July 1, 1978, Defendants James Mitchell and Artie Mitchell are ordered and directed to deposit the sum of $100,000.00 in trust for the City of Santa Ana at the United California Bank, Santa Ana Main Branch, as a security deposit against future

attorney fees, costs, and expenses incurred by by the City of Santa Ana, in connection with any further public nuisance action that the City Council may determine to bring against Defendants in connection with the operation of their Mitchell Brothers' Santa Ana Theatre. Future lawsuits are defined as any lawsuits filed subsequent to July 1, 1978. Withdrawals from this account to be upon written order of a Judge of the Orange County Superior Court on motion of Plaintiff in said lawsuit, if any, duly supported with evidence in support of the withdrawal, and on the further and express condition that on the merits, a Judge or jury has previously determined

that Defendants maintained a public nuisance by exhibiting an obscene motion picture film at the Mitchell Brothers' Santa Ana Theatre and which is involved in said lawsuit. It is further ordered that all interest from this account accrue to the benefit of defendants. At the expiration of two (2) years from July 1, 1978, in the event that there is a balance remaining in the account and on motion of Defendants, an Orange County Superior Judge, upon determination that no public nuisance lawsuits by Plaintiff are then pending against Defendants in the Orange County Superior Court, may order termination of the account, and any balance paid to the

Defendants. Defendants are further ordered to present proof of this deposit with the Court no later than July 10, 1978. Nothing herein is to be construed as a substitute or alternative to any damages that may be awarded the City by a Judge or jury. Plaintiff is ordered to provide the Bank with a copy of this Order.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that upon the Judgment herein becoming final, the following named motion picture film prints declared obscene herein, and now in evidence are ordered destroyed pursuant to Penal Code Section 312, or other applicable law.

IT IS FURTHER ORDERED, ADJUDGED

AND DECREED that Plaintiff recover their costs of suit herein, as allowed by law and as previously determined by the Court in the sum of $ 5,869.31 .

DATED: June 6, 1978

/s/ Marvin G. Weeks
Marvin G. Weeks
Judge (Assigned) of
the Superior Court

APPENDIX E

(Reference: Petition at pg. 2,
31,
32,
33.)

Orders of California Supreme Court and Court of Appeal.

.....E-1 Thru E-7

SUPREME COURT

FILED

MAR 18 1981

LAURENCE P. GILL, Clerk

_____ Deputy

4 CIVIL No. 19940

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

PEOPLE EX REL. GOW, ETC.

V.

MITCHELL BROTHERS SANTA ANA THEATER ET AL.

The time for granting or denying a hearing in the above cause is hereby extended to and including APRIL 20, 1981 or the date upon which a hearing is either granted or denied.

/s/ Bird
Chief Justice

SUPREME COURT

FILED

APR 16 1981

LAURENCE P. GILL, Clerk

_____
Deputy

4th Civil No. 19440

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

PEOPLE EX REL., GOW, ETC.,
Plaintiff and Appellant

v.

MITCHELL BROTHERS SANTA ANA THEATER ET AL
Defendants and Appellants

The time for granting or denying a hearing in the above cause is hereby extended to and including May 20, 1981 or the date upon which a hearing is either granted or denied.

/s/ Bird
Chief Justice

SUPREME COURT

FILED

MAY 13 1981

LAURENCE P. GILL, Clerk

_____ Deputy

ORDER DENYING HEARING

AFTER JUDGMENT BY THE COURT OF APPEAL

4th District, Division 2, Civil No. 19940

IN THE SUPREME COURT OF THE

STATE OF CALIFORNIA

IN BANK

PEOPLE ex rel. Gow, etc.,
Plaintiff and Appellant,

v.

MITCHELL BROTHERS SANTA ANA THEATER et al.,
Defendants and Appellants.

Petitions for hearing DENIED.

/s/ Bird
Chief Justice

IN THE

Court of Appeal, Fourth Appellate District

State of California

DIVISION TWO

4 CIVIL No. 19940

REMITTITUR

PEOPLE ET AL Plaintiffs and Appellants	Superior Court No.
VS.	256530
MITCHELL BROTHERS SANTA ANA THEATER ET AL Defendants and Appellants	County of Orange

I, ROBERT L. FORD, Clerk of the Court of Appeal, Fourth Appellate District, State of California, certify the attached is a true and correct copy of the original opinion or decision entered in the above entitled cause on January 20, 1981 and this opinion or decision has now become final. Appellant, Mitchell Brothers to recover costs on Appeal.

Witness by hand and seal of the Court this 18th day of May, 1981

Robert L. Ford, Clerk

By /s/ Henry Espinoza
Deputy

COURT OF APPEAL-STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

COURT OF APPEAL-FOURTH DIST.

FILED

JUN 9 1981

ROBERT L. FORD, Clerk

_____
Deputy Clerk

PEOPLE OF THE STATE OF CALIFORNIA ex rel. KEITH GOW, City Attorney of City of Santa Ana Respondent and Cross-Appellant	No. 4 Civil 19940
vs.	COUNTY NO.
MITCHELL BROTHERS SANTA ANA THEATER, ETC., et al Appellants and Cross-Respondent	256530 Orange County

THE COURT:

The Motion for Order Recalling Remittitur, filed June 3, 1981, by Respondent and Cross-Appellant, is DENIED.

Morris, J.
acting Presiding Justice

COURT OF APPEAL-STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

COURT OF APPEAL-FOURTH DIST.

FILED

JUN 30 1981

ROBERT L. FORD, Clerk

_____ Deputy Clerk

PEOPLE OF THE STATE OF CALIFORNIA ex rel. KEITH GOW, City Attorney of City of Santa Ana Respondent and Cross-Appellant	No. 4 Civil 19940
vs.	COUNTY No. 256530
MITCHELL BROTHERS SANTA ANA THEATER, etc., et al Appellants and Cross-Respondent	

THE COURT:

Respondent and Cross-Appellant's motion for order Recalling Remittitur is DENIED.

McDaniel, J.
acting Presiding Justice

APPENDIX F

(Reference: Petition at pg. 3,
33,
57.)

California Statutory Provisions Involved.

.....F-1 Thru F-22

APPENDIX "F"

Civil Code § 5. Provisions similar to existing laws, how construed

The provisions of this code, so far as they are substantially the same as existing statutes or the common law, must be construed as continuations thereof, and not as new enactments.

Civil Code § 22.2. [Common law, when rule of decision]

The common law of England, so far as it is not repugnant to or inconsistent with the Constitution of the United States, or the Constitution or laws of this State, is the rule of decision in all the courts of this State.

Civil Code § 3366. [Specific relief, etc., when allowed]

Specific or preventive relief may be

given as provided by the laws of this state.

Civil Code § 3367. Specific relief, how given

Specific relief is given:

1. By taking possession of a thing, and delivering it to a claimant;

2. By compelling a party himself to do that which ought to be done; or,

3. By declaring and determining the rights of parties, otherwise than by an award of damages.

Civil Code § 3368. Preventive relief, how given

Preventive relief is given by prohibiting a party from doing that which ought not to be done.

Civil Code § 3369. [Relief not granted to enforce penalty, forfeiture or penal law: Exceptions: Unfair competition enjoinable: Definitions: Who may prosecute actions]

1. Neither specific not preventive relief can be granted to enforce a penalty or forfeiture in any case, nor to enforce a penal law, except in a case of nuisance or unfair competition.

2. . . .

3. . . .

4. As used in this section, the term person shall mean and include natural persons, corporations, firms, partnerships, joint stock companies, associations and other organizations of persons.

5. Actions for injunction under this section may be prosecuted by the Attorney General or any district attorney in this State in the name of the people of the State of California upon their own complaint or upon the complaint of any board, officer, person, corporation, or association or by any person acting for the interests of itself, its members or the general public.

Civil Code § 3479. [Nuisance, what]

Anything which is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway is a nuisance.

Civil Code § 3480. [Public nuisance]

A public nuisance is one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal.

Civil Code § 3481. Private nuisance.

Every nuisance not included in the definition of the last section is private.

Civil Code § 3482. What is not deemed a nuisance.

Nothing which is done or maintained under the express authority of a statute can be deemed a nuisance.

Civil Code § 3483. Successive owners.

Every successive owner of property who neglects to abate a continuing nuisance upon, or in the use of, such property, created by the former owner, is liable therefor in the same manner as the one who first created it.

Civil Code § 3484. Abatement does not preclude action

The abatement of a nuisance does not prejudice the right of any person to recover damages for its past existence.

Civil Code § 3490. Lapse of time does not legalize

No lapse of time can legalize a public nuisance, amounting to an actual

obstruction of public right.

Civil Code § 3491. [Remedies against public nuisance]

The remedies against a public nuisance are:

1. Indictment or information;

2. A civil action; or,

3. Abatement.

Civil Code § 3492. [Remedy regulated, how]

The remedy by indictment or information is regulated by the Penal Code.

Civil Code § 3493. Remedies for public nuisance

A private person may maintain an action for a public nuisance, if it is specially injurious to himself, but not otherwise.

Civil Code § 3494. Action

A public nuisance may be abated by any public body or officer authorized thereto by law.

Civil Code § 3495. How abated

Any person may abate a public nuisance which is specially injurious to him by removing, or, if necessary, destroying the thing which constitutes the same, without committing a breach of the peace, or doing unnecessary injury.

Civil Code § 3523. For every wrong there is a remedy.

Gov't Code § 38771. Declaration of nuisance

By ordinance the city legislative body may declare what constitutes a nuisance.

Gov't Code § 38773. Summary abatement of nuisances

The legislative body may provide for the summary abatement of any nuisance at the expense of the persons creating, causing, committing, or maintaining it and by ordinance may make the expense of abatement of nuisances a lien against the property on which it is maintained and a personal obligation against the property

owner.

Gov't Code § 38773.5. Cost of abatement of a nuisance upon land made a special assessment: Levy, collection and enforcement of assessment

The legislative body may by ordinance establish a procedure for the abatement of a nuisance and make the cost of abatement of a nuisance upon a parcel of land a special assessment against that parcel. The assessment may be collected at the same time and in the same manner as ordinary municipal taxes are collected, and shall be subject to the same penalties and the same procedure and sale in case of delinquency as provided for ordinary municipal taxes. All laws applicable to the levy, collection and enforcement of municipal taxes shall be applicable to such special assessment.

Code of Civil Procedure § 731. [(Right to bring action to enjoin or abate nuisance, and to recover damages: Abatement of public nuisance]

An action may be brought by any person whose property is injuriously affected, or whose personal enjoyment is lessened by a nuisance, as the same is defined in section thirty-four hundred and seventy-nine of the Civil Code, and by the judgment in such action the nuisance may be enjoined or abated as well as damages recovered therefor. A civil action may be brought in the name of the people of the State of California to abate a public nuisance, as the same is defined in section thirty-four hundred and eighty of the Civil Code, by the district attorney of any county in which such nuisance exists, or by the city attorney of any town or city in which such nuisance exists, and each of said officers

shall have concurrent right to bring such action for a public nuisance existing within a town or city, and such district attorney, or city attorney, of any county or city in which such nuisance exists must bring such action whenever directed by the board of supervisors of such county or whenever directed by the legislative authority of such town or city.

Penal Code §311. [Definitions.] As used in this chapter:

(a) "Obscene matter" means matter, taken as a whole, the predominant appeal of which to the average person, applying contemporary standards, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion; and is matter which taken as a whole goes substantially beyond customary limits of candor in description or representation of such matters; and is matter which taken as a whole is utterly without redeeming

social importance.

(1) The predominant appeal to prurient interest of the matter is judged with reference to average adults unless it appears from the nature of the matter or the circumstances of its dissemination, distribution or exhibition, that it is designed for clearly defined deviant sexual groups, in which case the predominant appeal of the matter shall be judged with reference to its intended recipient group.

(2) In prosecutions under this chapter, where circumstances of production, presentation, sale, dissemination, distribution, or publicity indicate that matter is being commercially exploited by the defendant for the sake of its prurient appeal, such evidence is probative with respect to the nature of the matter and can justify the conclusion that the matter is utterly without redeeming social importance.

(3) In determining whether the matter

taken as a whole goes substantially beyond customary limits of candor in description or representation of such matters the fact that the defendant knew that the matter depicts persons under the age of 16 years engaged in sexual conduct, as defined in subdivision (c) of Section 311.4, is a factor which can be considered in making such a determination.

(b) "Matter" means any book, magazine, newspaper, or other printed or written material or any picture, drawing, photograph, motion picture, or other pictorial representation or any statue or other figure, or any recording, transcription or mechanical, chemical or electrical reproduction or any other articles, equipment, machines or materials.

(c) "Person" means any individual, partnership, firm, association, corporation, or other legal entity.

(d) "Distribute" means to transfer pos-

session of, whether with or without consideration.

(e) "Knowingly" means being aware of the character of the matter or live conduct.

(f) "Exhibit" means to show.

Penal Code §311.2 [Sale or distribution, etc., of obscene matter.] (a) Every person who knowingly sends or causes to be sent, or brings or causes to be brought, into this state for sale or distribution, or in this state possesses, prepares, publishes, or prints, with intent to distribute or to exhibit to others, or who offers to distribute, distributes, or exhibits to others, any obscene matter is guilty of a misdemeanor.

(b) Every person who knowingly sends or causes to be sent, or brings or causes to be brought, into this state for sale or distribution, or in this state possesses, prepares, publishes, or prints, with intent to distribute or to exhibit to others

for commercial consideration, or who offers to distribute, distributes, or exhibits to others for commercial consideration, any obscene matter, knowing that such matter depicts a person under the age of 18 years personally engaging in or personally simulating sexual intercourse, masturbation, sodomy, bestiality, or oral copulation is guilty of a felony and shall be punished by imprisonment in state prison for two, three, or four years, or by a fine not exceeding fifty thousand dollars ($50,000), in the absence of a finding that the defendant would be incapable of paying such a fine, or by both such fine and imprisonment.

(c) The provisions of this section with respect to the exhibition of, or the possession with intent to exhibit, any obscene matter shall not apply to a motion picture operator or projectionist who is employed by a person licensed by any city

or county and who is acting within the scope of his employment, provided that such operator or projectionist has no financial interest in the place wherein he is so employed.

(d) Except as otherwise provided in subdivision (c), the provisions of subdivision (a) or (b) with respect to the exhibition of, or the possession with intent to exhibit, any obscene matter shall not apply to any person who is employed by a person licensed by any city or county and who is acting within the scope of his employment, provided that such employed person has no financial interest in the place wherein he is so employed and has no control, directly or indirectly, over the exhibition of the obscene matter.

Penal Code §370. [Public nuisances defined.] Anything which is injurious to health, or is indecent, or offensive to the senses, or an obstruction to the free

use of property, so as to interfere with the comfortable enjoyment of life or property by an entire community or neighborhood, or by any considerable number of persons, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway, is a public nuisance.

Penal Code §371. [Unequal damage.] An act which affects an entire community or neighborhood, or any considerable number of persons, as specified in the last section, is not less a nuisance because the extent of the annoyance or damage inflicted upon individuals is unequal.

Penal Code §372. Maintaining a nuisance, a misdemeanor. Every person who maintains or commits any public nuisance, the punishment for which is not otherwise prescribed, or who willfully omits to perform

any legal duty relating to the removal of a public nuisance, is guilty of a misdemeanor.

Penal Code §373a. [Maintaining or permitting public nuisance after abatement notice: Each day's existence a separate offense: Duty of district attorney.]

Every person who maintains, permits, or allows a public nuisance to exist upon his or her property or premises, and every person occupying or leasing the property or premises of another who maintains, permits or allows a public nuisance to exist thereon, after reasonable notice in writing from a health officer or district attorney or city attorney or prosecuting attorney to remove, discontinue or abate the same has been served upon such person, is guilty of a misdemeanor, and shall be punished accordingly; and the existence of such nuisance for each and every day after the service of such notice shall be deemed

a separate and distinct offense, and it is hereby made the duty of the district attorney, or the city attorney of any city the charter of which imposes the duty upon the city attorney to prosecute state misdemeanors, to prosecute all persons guilty of violating this section by continuous prosecutions until the nuisance is abated and removed.

Rule 26. Costs on Appeal

(a) (Right to costs) Except as hereinafter provided, the prevailing party shall be entitled to his costs on appeal as an incident to the judgment on appeal. In the case of a general and unqualified affirmance of the judgment, or the dismissal of an appeal, the respondent shall be deemed the prevailing party; in the case of a reversal, in whole or in part, or of a modification of the judgment, the appellant shall be deemed the prevailing party. In any case in which

the interests of justice require it, the reviewing court may make any award or apportionment of costs which it deems proper. . . .The foregoing provisions do not apply in criminal cases. Where the appeal is frivolous or taken solely for the purpose of delay or where any party shall have required in the typewritten or printed record on appeal the inclusion of any matter not reasonably material to the determination of the appeal, or has been guilty of any other unreasonable infraction of the rules governing appeals, the reviewing court may impose upon offending attorneys or parties such penalties, including the withholding or imposing of costs, as the circumstances of the case and the discouragement of like conduct in the future may require.

(b) (Entry of judgment for costs) In any case in which the reviewing court

directs the manner in which costs shall be awarded or denied, the clerk shall enter on the record and insert in the remittitur a judgment in accordance with such directions. In the absence of such directions by the reviewing court the clerk shall enter on the record and insert in the remittitur a judgment for costs as follows: (1) in the case of a general and unqualified affirmance of the judgment, for the respondent; (2) in the case of a dismissal of the appeal, for the respondent; (3) in the case of a modification of the judgment, for the appellant; and (4) in the case of a reversal of the judgment, in whole or in part, with or without directions, for the appellant. In any case where the clerk fails to enter judgment for costs as provided in this subdivision, the reviewing court, on motion made not later than 30 days after issuance of the remittitur, or on its own motion, may

recall it for correction.

(c) . . .

U.S. CONSTITUTION, AMENDMENT I

Congress shall made no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. CONSTITUTION, AMENDMENT IX

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

U.S. CONSTITUTION, AMENDMENT X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

U.S. CONSITUTION, AMENDMENT XIV

Section 1. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX G

(Reference: Petition at pg. 5, fn. 2
20, fn. 3
44.)

Time and Motion Study of Film "Sodom and Gommorrah" exhibited at the Mitchell Brothers' Santa Ana Theater as a part of a triple feature from September 3, 1975 thru January 15, 1976.

.....G-1 Thru G-60

APPENDIX G

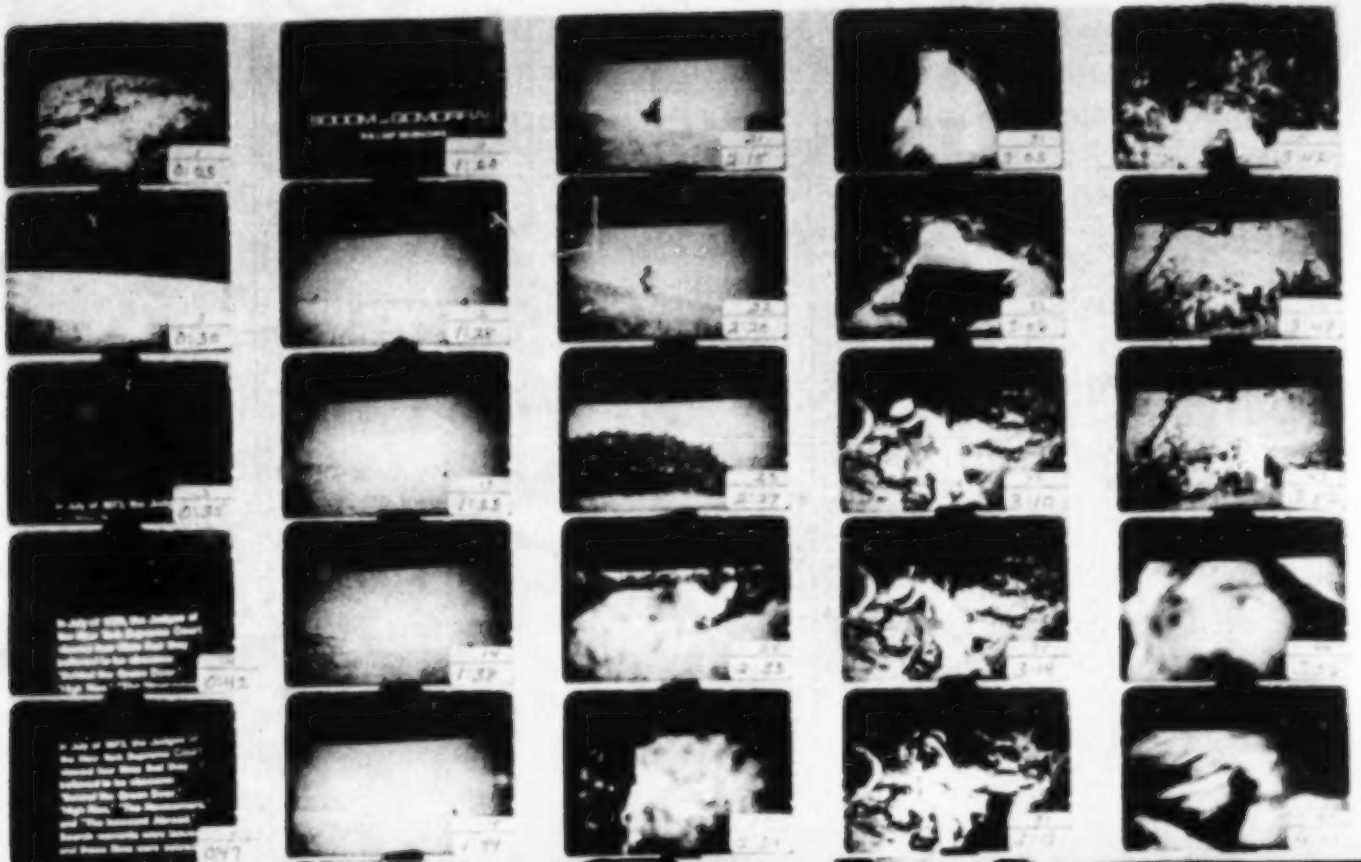
TIME-MOTION STUDY OF FILM "SODOM AND GOMORRAH"*

Exhibited at the Mitchell Brothers' Santa Ana Theater from 9/3/75 thru 1/15/76 (as part of a triple feature) and pleaded as Exhibits 1, 2 and 3 to the First Amended and Supplemental Complaint. See Petition at fn. 2 on page .

* A time-motion study is a chronological series of still photographs of a motion picture film, timed in their relative order of appearance, which, by "stopping" the movement appearing on the motion picture screen and recording the same, permits the type of conduct being portrayed thereon to be analyzed in a fair and accurate manner.

Sodom and Gomorrah
(Part 1 of 30 Parts)

Exhibited at the Mitchell Brothers' Santa Ana Theater from 9/3/75 thru 1/15/76. See Petition at fn. 2 on p 5



FRAMES 1-11 TITLE, "SODOM & GOMORRAH" AND FACE OF NARRATOR; FRAMES 12-29 MALE CHASING FEMALE, CATCHES HER, AND FORCES HER TO PERFORM FELLATIO; FRAMES 30-36 FELLATIO; FRAMES 37-46 FRIENDS OF FEMALE KILL MALE; FRAMES 47-50 LOT AND PART OF FAMILY TALK TO STRANGERS.

Sodom and Gomorrah
(Part 2 of 30 Parts)

Exhibited at the Mitchell Brothers' Santa Ana Theater from 9/3/75 thru 1/15/76. See Petition at fn. 2 on p 5

FRAMES 51-83 LOT AND FAMILY DISCUSS MOVING; FRAMES 84-100 SPACE SHOTS INSIDE OF SPACE SHIP WHERE A MONKEY DRESSED IN A CAPE AND HAT IS APPARENTLY TUNING IN ON LOT'S CONVERSATION. THE MONKEY'S VOICE HAS A "JOHN WAYNE" ACCENT.

Sodom and Gomorrah
(Part 3 of 30 Parts)

Exhibited at the Mitchell Brothers' Santa Ana Theater from 9/3/75 thru 1/15/76. See Petition at fn. 2 on P 5

FRAMES 101-106 CONTINUE SPACE FANTASY; FRAMES 107-150 LOT AND FAMILY. MALE MEETS ONE OF LOT'S DAUGHTERS. THEY GO OFF INTO THE HILLS AND CLIMB A TREE.

Sodom and Gomorrah
(Part 4 of 30 Parts)

Exhibited at the Mitchell Brothers' Santa Ana Theater from 9/3/75 thru 1/15/76. See Petition at fn. 2 on p. 5

FRAMES 151-153 MALE AND FEMALE IN TREE; FRAMES 154-169 MALE ENGAGES IN CUNNILINGUS WITH FEMALE; FRAMES 170-184 MALE AND FEMALE DISCUSS THAT NORMAL INTERCOURSE IS AGAINST THE LAW; FRAMES 185-197 COUPLE ENGAGES IN SODOMY IN TREE.

Sodom and Gomorrah
(Part 5 of 30 Parts)

Exhibited at the Mitchell Brothers' Santa Ana Theater from 9/3/75 thru 1/15/76. See Petition at fn. 2 on p 5

FRAMES 201-223 SODOMY CONTINUES. MALE REMOVES PENIS FROM FEMALE'S ANUS AND EJACULATES. EJACULATION FALLS ON THE FACE OF LOT WHO IS UNDER THE TREE; FRAMES 224-243 [illegible] SHIFTS TO SPACE SHIP AND MONKEY; FRAMES 244-250 LOT'S WIFE TALKS TO LOT.

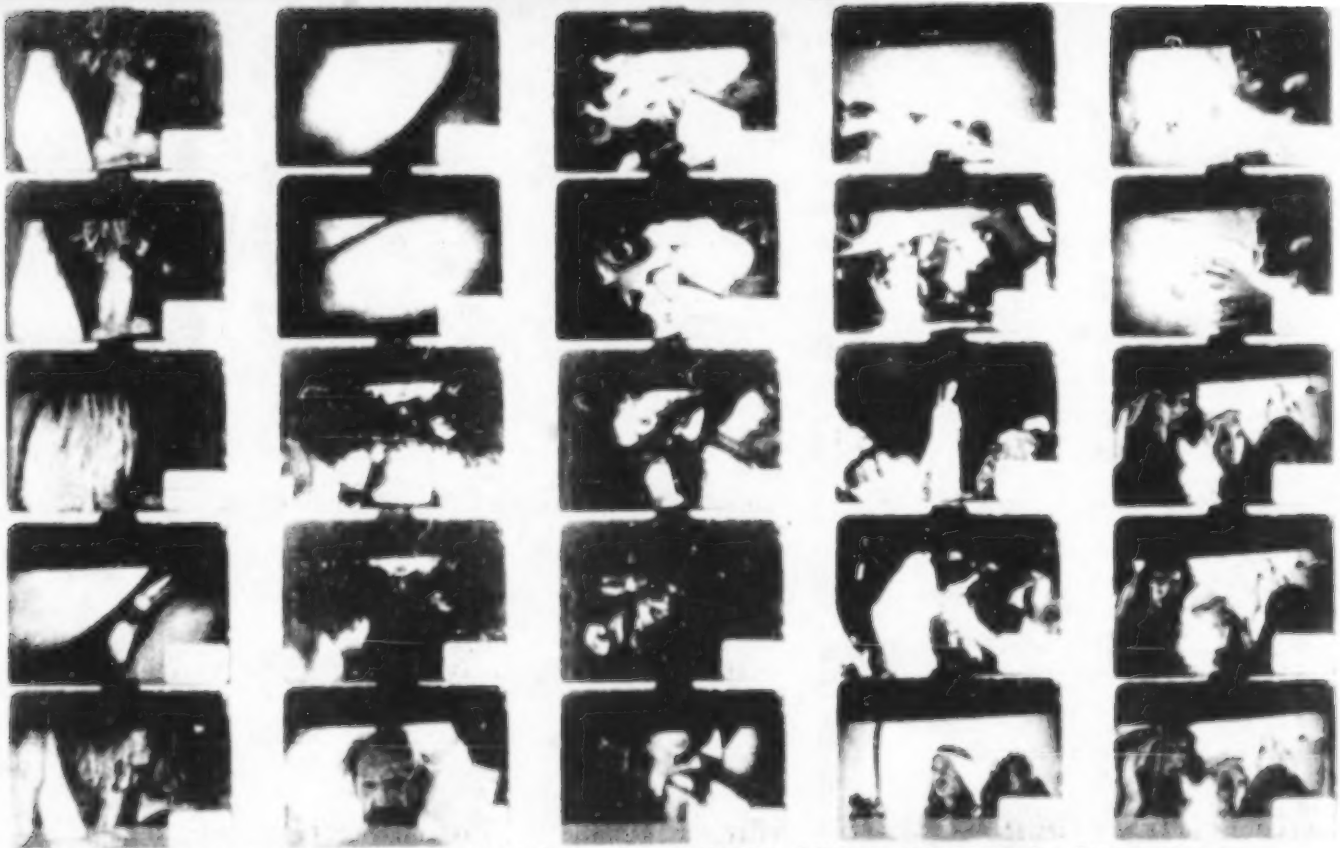
Sodom and Gomorrah
(Part 6 of 30 Parts)

Exhibited at the Mitchell Brothers' Santa Ana Theater from 9/3/75 thru 1/15/76. See Petition at fn. 2 on p 5

FRAMES 251-300 PEOPLE HAVING VARIOUS CONVERSATIONS. A MALE AND FEMALE MEET, TALK, AND THEN ENGAGE IN SEXUAL INTERCOURSE UNDER TREE. MALE WITH LONG BEARD AND STAFF APPROACHES AND WATCHES MALE AND FEMALE UNDER TREE.

Sodom and Gomorrah
(Part 7 of 30 Parts)

Exhibited at the Mitchell Brothers' Santa Ana Theater from 9/3/75 thru 1/15/76. See Petition at fn. 2 on p 5



FRAMES 301-303 MALE WITH BEARD CONTINUES TO WATCH COUPLE ENGAGED IN INTERCOURSE THROUGH FRAME 303; FRAMES 304-314 MALE WITH BEARD MASTURBATES AND THEN FELLATES HIMSELF; FRAMES 324-333 FELLATIO CONTINUES; FRAMES 335-344 SCENE SHIFTS. LOT AND HIS FAMILY ARRIVE IN SODOM. THEY WATCH SLAVE BUYING SCENE WHERE FEMALES ARE PUT ON AUCTION AND SOLD; FRAMES 345-350 CUSTOMER INSPECTS FEMALE VAGINAL AREA.

Sodom and Gomorrah
(Part 8 of 30 Parts)

Exhibited at the Mitchell Brothers' Santa Ana Theater from 9/3/75 thru 1/15/76. See Petition at fn. 2 on p 5

FRAMES 351-370 SCENES OF SLAVE MARKET; FRAMES 371-376 KING OF SODOM.

Sodom and Gomorrah
(Part 9 of 30 Parts)

Exhibited at the Mitchell Brothers' Santa Ana Theater from 9/3/75 thru 1/15/76. See Petition at fn. 2 on p 5

FRAMES 401-450 LOT AND FAMILY TALKING IN FRONT OF THE KING OF SODOM.

Sodom and Gomorrah
(Part 10 of 30 Parts)

Exhibited at the Mitchell Brothers' Santa Ana Theater from 9/3/75 thru 1/15/76. See Petition at fn. 2 on p 5

FRAMES 451-500 KING OF SODOM TALKS WITH LOT AND HIS WIFE. SHOT OF SPACE SHIP AND MONKEY.

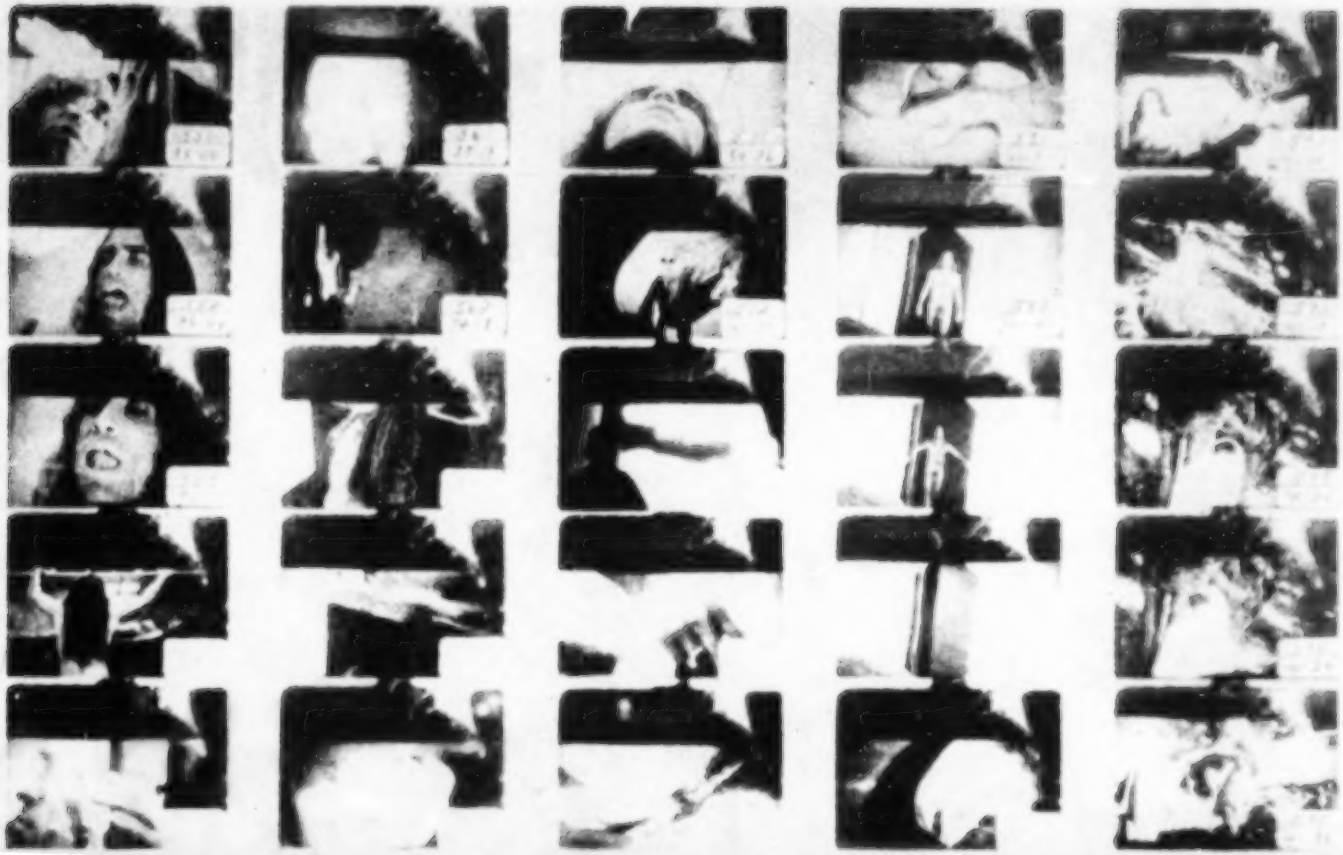
Sodom and Gomorrah
(Part 11 of 30 Parts)

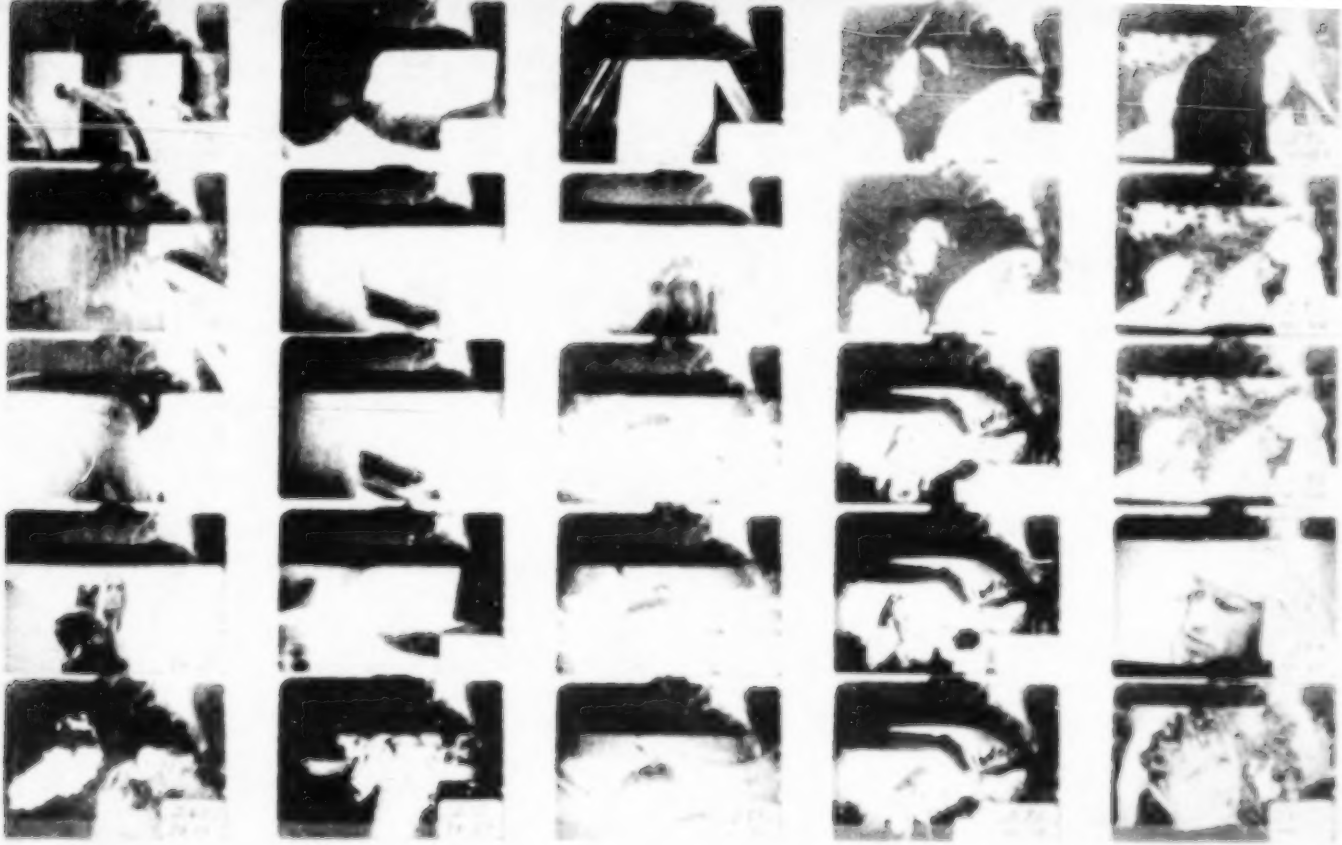
Exhibited at the Mitchell Brothers' Santa Ana Theater from 9/3/75 thru 1/15/76. See Petition at fn. 2 on p 5

FRAMES 501-550 SPACE SHIP INTERIOR SHOW MONKEY AND MALE ASSISTANT DRESSED IN BATHING SUIT AND CAPE. MALE ENTERS ROOM WHERE NUDE FEMALE RESTS IN GLASS CASE. MALE PRESSES AGAINST CASE AND BEGINS TO MASTURBATE.

Sodom and Gomorrah
(Part 12 of 30 Parts)

Exhibited at the Mitchell Brothers' Santa Ana Theater from 9/3/75 thru 1/15/76. See Petition at fn. 2 on p 5

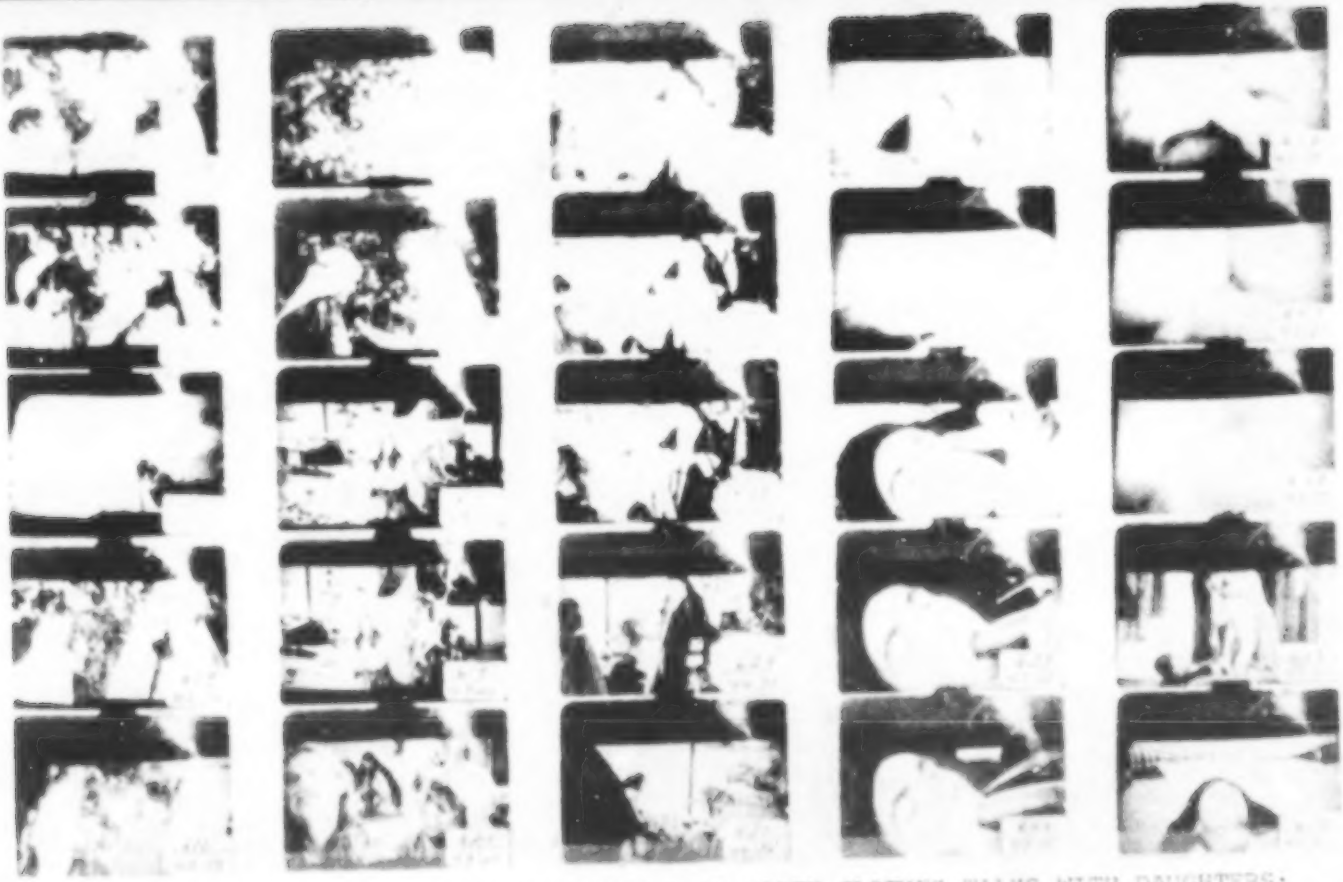




FRAMES 551-591 MALE MASTURBATES AGAINST CASE, EJACULATES INTO TUBE. MALE THEN TALKS WITH MOOSE HANGING ON WALL; FRAMES 592-600 MALE FROM SPACE SHIP SHOWN ON EARTH DRESSED IN BIBLICAL CLOTHES TALKING WITH ONE OF LOT'S DAUGHTERS.

Sodom and Gomorrah
(Part 13 of 30 Parts)

Exhibited at the Mitchell Brothers' Santa Ana Theater from 9/3/75 thru 1/15/76. See Petition at fn. 2 on p 5



FRAMES 601-614 SPACE SHIP MALE NOW DRESSED IN EARTH CLOTHES TALKS WITH DAUGHTERS;
FRAMES 616-631 LOT AND HIS WIFE SELLING THINGS AT A STORE THEY HAVE SET UP IN SODOM;
FRAMES 632-650 A MALE GOES IN BACK SECTION OF TENT WITH LOT'S WIFE. MALE PLACES
CUCUMBER IN THE VAGINA OF LOT'S WIFE, THEN PLACES CUCUMBER IN HIS MOUTH.

Sodom and Gomorrah
(Part 14 of 30 Parts)

Exhibited at the Mitchell Brothers' Santa Ana Theater from 9/3/75 thru 1/15/76. See Petition at fn. 2 on p 5

FRAMES 651-673 MALE AND LOT'S WIFE CONTINUE WITH CUCUMBER; FRAMES 674-699 LOT AND WIFE AND OTHER PEOPLE TALKING; FRAME 700 KING OF SODOM.

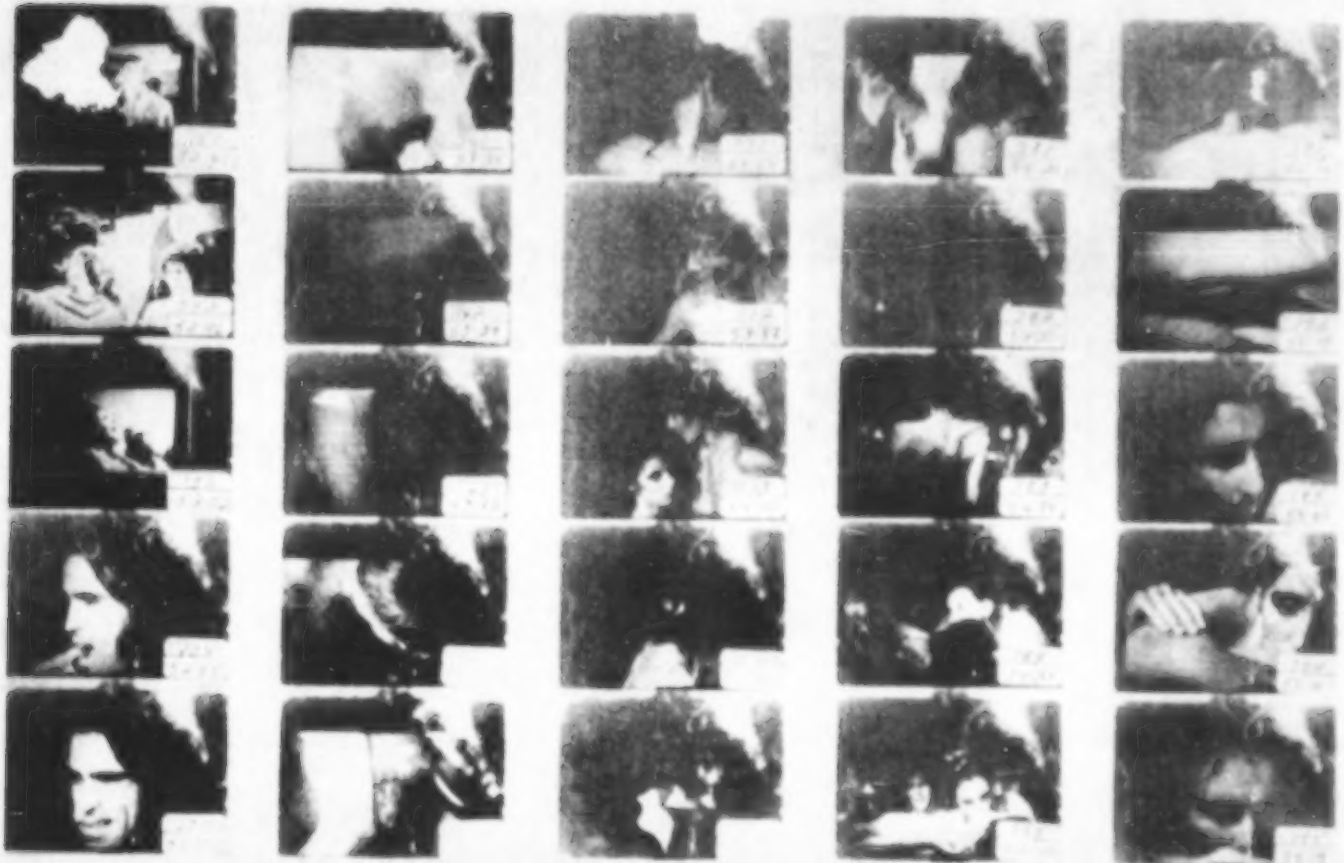
Sodom and Gomorrah
(Part 15 of 30 Parts)

Exhibited at the Mitchell Brothers' Santa Ana Theater from 9/3/75 thru 1/15/76. See Petition at fn. 2 on p 5

FRAMES 701-728 PEOPLE SPEAK WITH KING OF SODOM; FRAMES 729-730 A MALE PLACES PIECE OF CHICKEN AGAINST VAGINA OF FEMALE AND THEN EATS CHICKEN; FRAMES 731-750 PEOPLE CONTINUE TALKING.

Sodom and Gomorrah
(Part 16 of 30 Parts)

Exhibited at the Mitchell Brothers' Santa Ana Theater from 9/3/75 thru 1/15/76. See Petition at fn. 2 on p 5



FRAMES 751-760 PEOPLE TALKING; FRAMES 761-795 FEMALES ENGAGE IN LESBIAN-TYPE KISSING OF BREASTS; FRAMES 796-800 KING OF SODOM TALKING.

Sodom and Gomorrah
(Part 17 of 30 Parts)

Exhibited at the Mitchell Brothers' Santa Ana Theater from 9/3/75 thru 1/15/76. See Petition at fn. 2 on p 5

FRAMES 801-806 KING OF SODOM KISSING A FEMALE NEAR VAGINA AREA; FRAMES 807-847 OUTDOOR SCENES--MARKET PLACE; FRAMES 848-850 FELLATIO.

Sodom and Gomorrah
(Part 18 of 30 Parts)

Exhibited at the Mitchell Brothers' Santa Ana Theater from 9/3/75 thru 1/15/76. See Petition at fn. 2 on p 5

FRAMES 851-856 FELLATIO; FRAMES 868-875 MALE PLACES BANANA IN FEMALE'S VAGINA THEN PLACES BANANA IN HER MOUTH; FRAMES 877-887 FELLATIO; FRAMES 891-892 CUNNILINGUS; FRAME 893 FELLATIO; FRAMES 894-897 CUNNILINGUS; FRAME 898 FELLATIO.

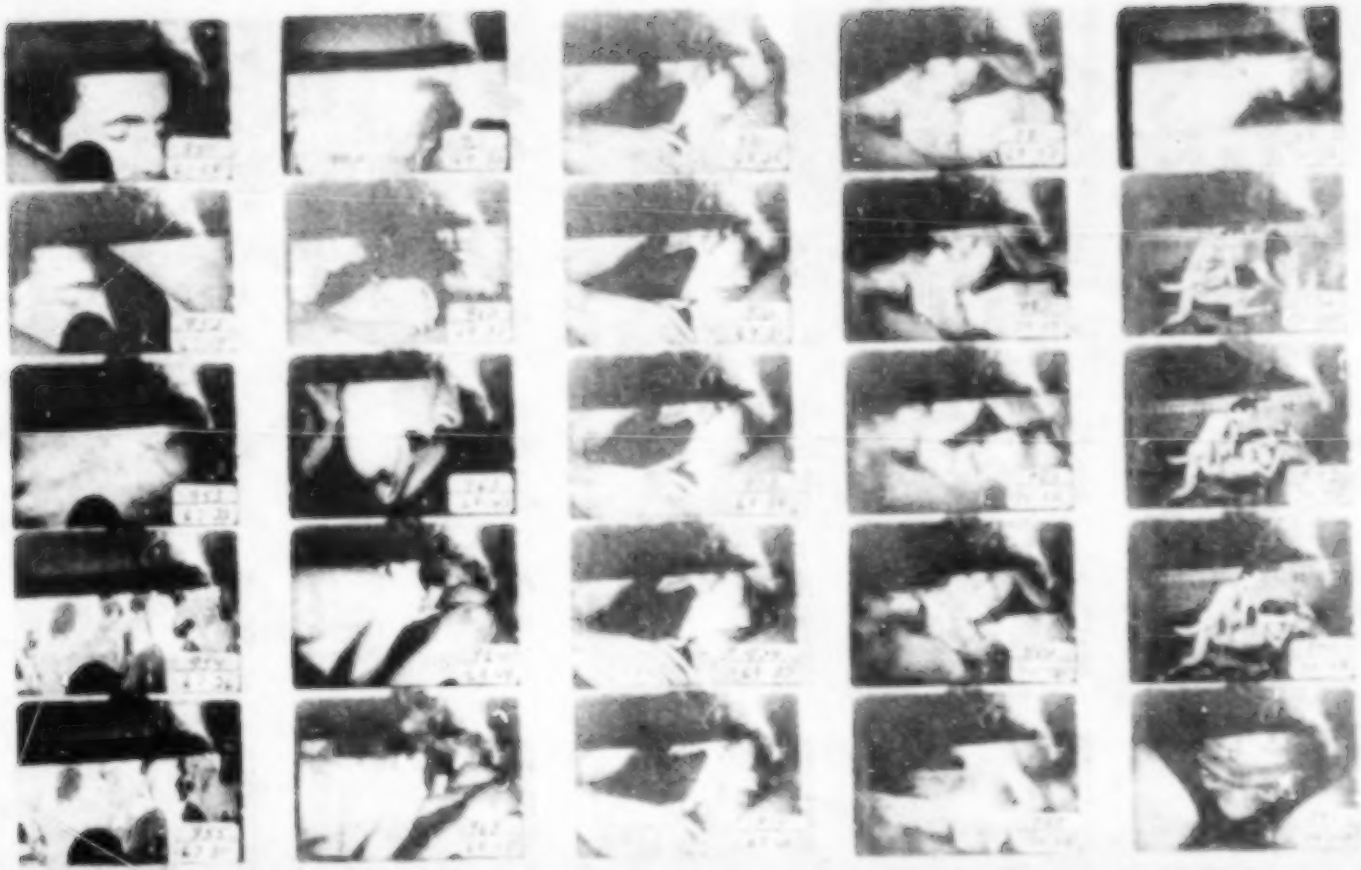
Sodom and Gomorrah
(Part 19 of 30 Parts)

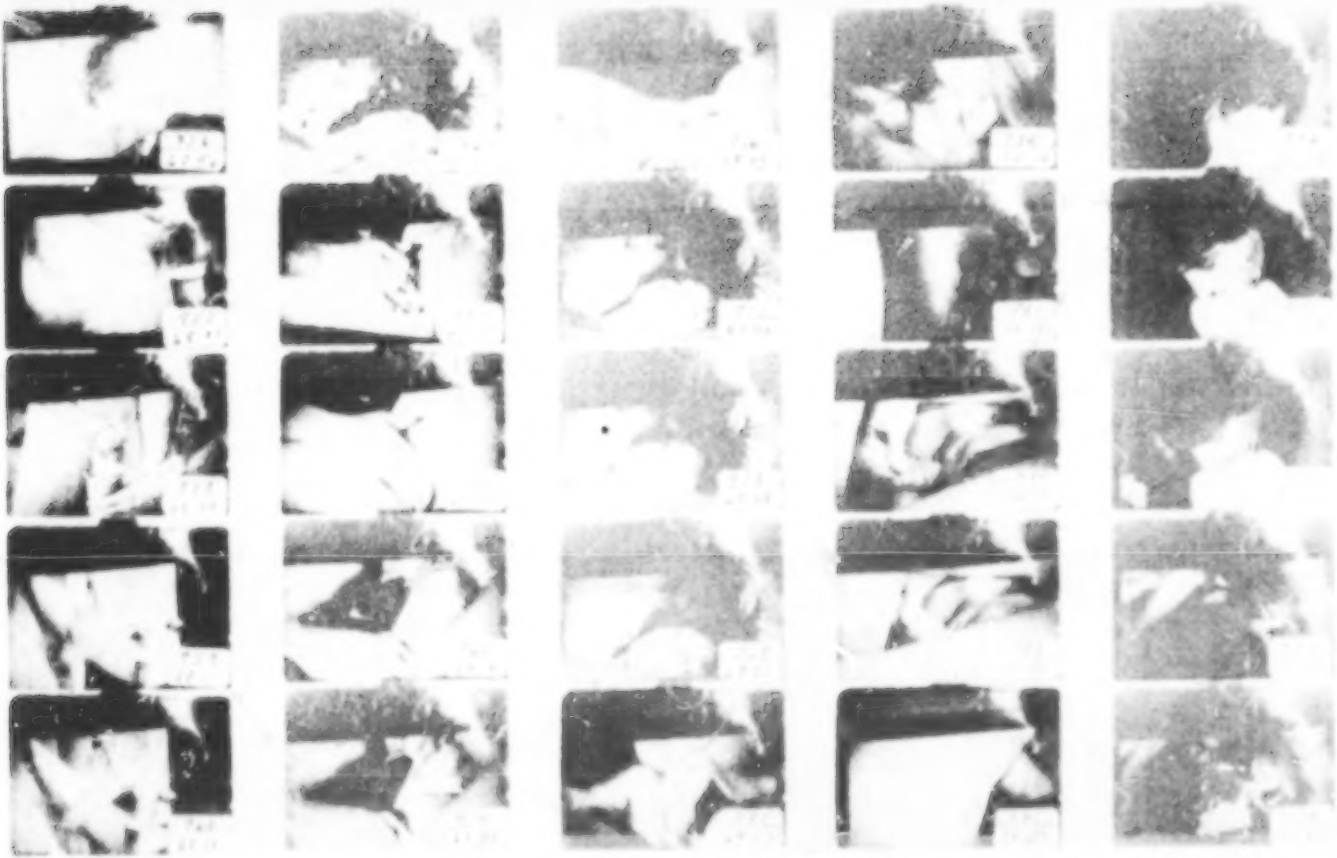
Exhibited at the Mitchell Brothers' Santa Ana Theater from 9/3/75 thru 1/15/76. See Petition at fn. 2 on p 5

FRAMES 904-907 FELLATIO; FRAMES 916-921 FELLATIO; FRAMES 923-950 MALE AND FEMALES ENGAGED IN SEXUAL INTERCOURSE AND CUNNILINGUS.

Sodom and Gomorrah
(Part 20 of 30 Parts)

Exhibited at the Mitchell Brothers' Santa Ana Theater from 9/3/75 thru 1/15/76. See Petition at fn. 2 on p 5

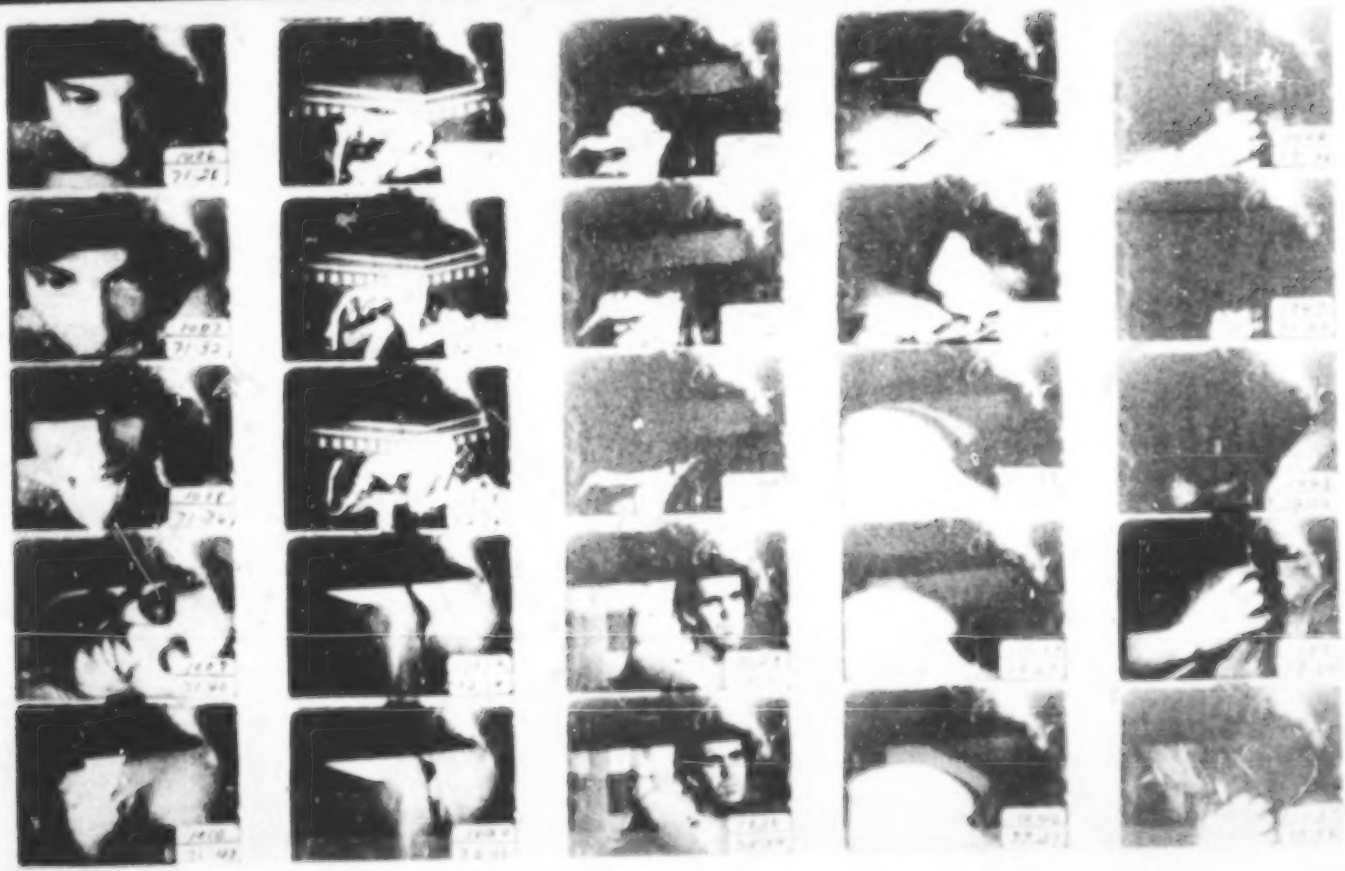




FRAMES 951-952 CUNNILINGUS; FRAMES 954-961 MALE MASTURBATING AND EJACULATING INTO GOLD CUP; FRAMES 962-1000 FEMALE PERFORMS CUNNILINGUS ON ANOTHER FEMALE--FEMALE MASTURBATES FEMALE--MALE ENGAGES FEMALE IN SEXUAL INTERCOURSE--MALE ENGAGES FEMALE IN CUNNILINGUS.

Sodom and Gomorrah
(Part 21 of 30 Parts)

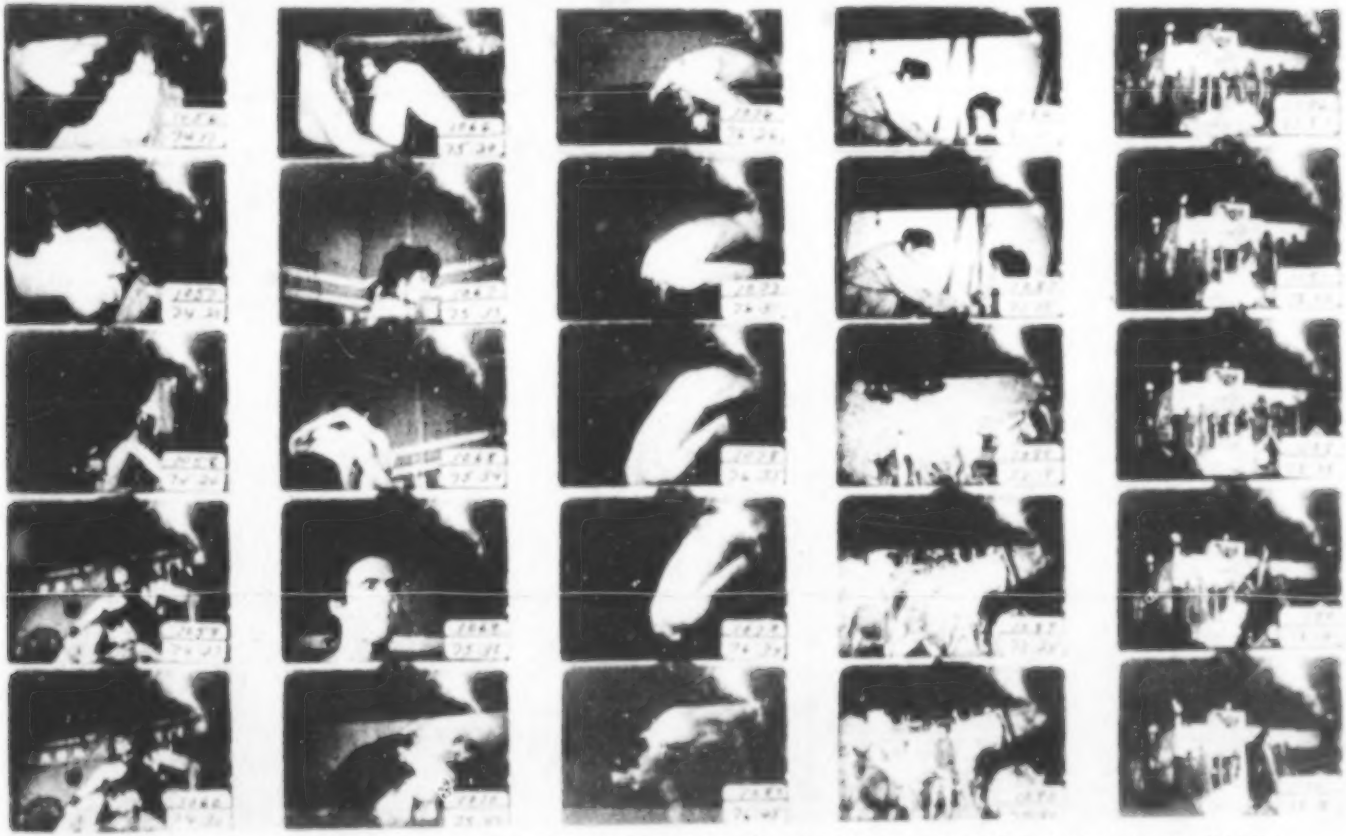
Exhibited at the Mitchell Brothers' Santa Ana Theater from 9/3/75 thru 1/15/76. See Petition at fn. 2 on p 5



FRAMES 1001-1050 FEMALE LESBIAN-TYPE ACTIVITY. CUNNILINGUS. FEMALE PERFORMS FELIATIO ON MALE.

Sodom and Gomorrah
(Part 22 of 30 Parts)

Exhibited at the Mitchell Brothers' Santa Ana Theater from 9/3/75 thru 1/15/76. See Petition at fn. 2 on p 5



FRAMES 1051-1062 TWO FEMALES PERFORM FELLATIO ON ONE MALE; FRAMES 1063-1073 MALES AND FEMALES IN BATHTUB; FRAMES 1074-1084 MALE SHOVING CUCUMBER INTO ANUS OF ANOTHER MALE. CUCUMBER COMES OUT AS MALE STANDS; FRAMES 1085-1088 OUTDOOR SCENES; FRAMES 1089-1091 MALE MASTURBATES BY DONKEY. DONKEY RUNS AWAY; FRAMES 1092-1100 OUTDOOR SCENE, MALES AND FEMALE BY FIRE.

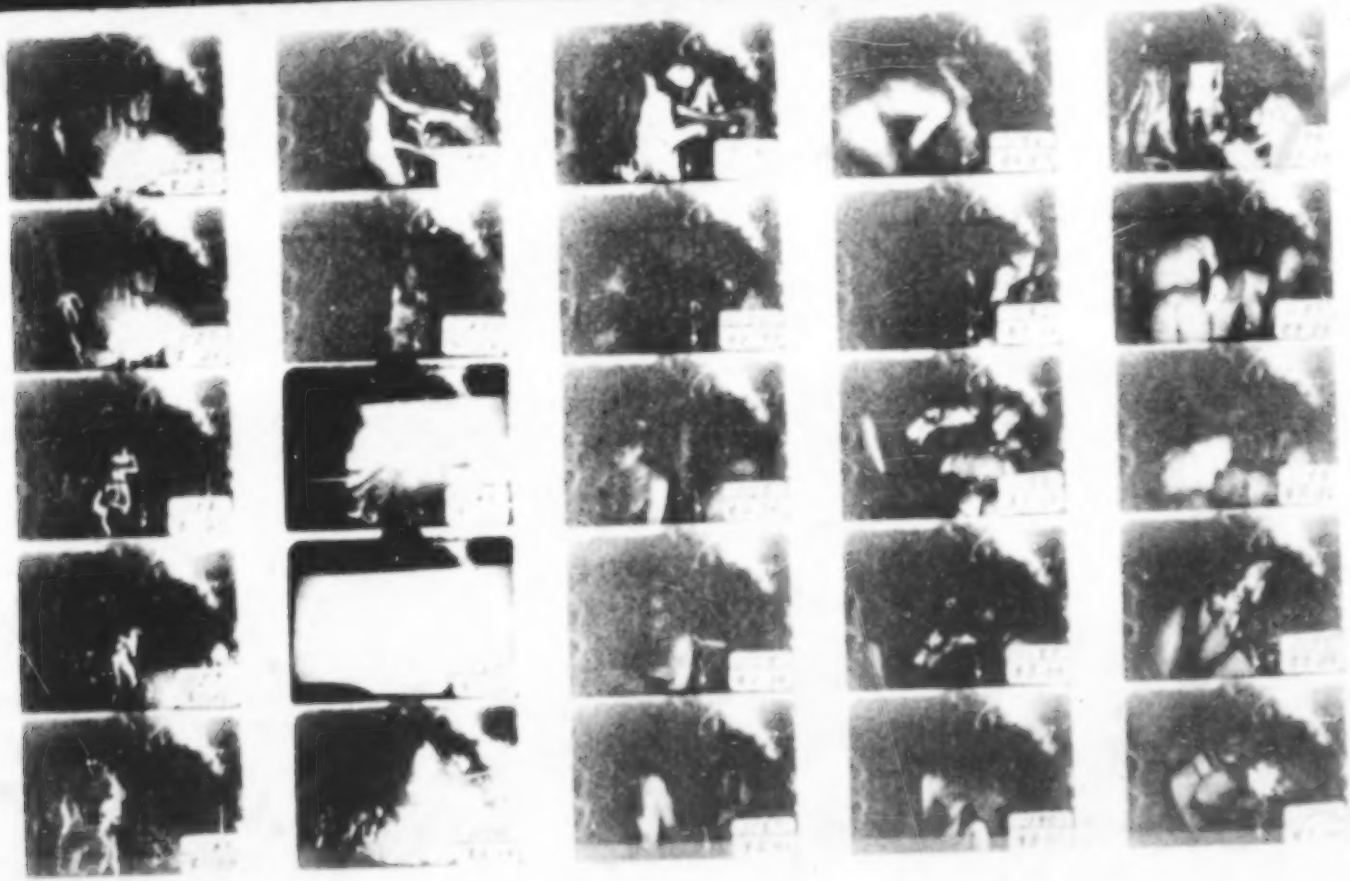
Sodom and Gomorrah
(Part 23 of 30 Parts)

Exhibited at the Mitchell Brothers' Santa Ana Theater from 9/3/75 thru 1/15/76. See Petition at fn. 2 on p 5

FRAMES 1101-1150 GROUP OF MALES AND FEMALES BY FIRE. MAN FROM SPACE SHIP FIGHTS WITH LONG-HAIRED, SHAGGY EARTHLING. THEY HAVE FIGHT AROUND FIRE.

Sodom and Gomorrah
(Part 24 of 30 Parts)

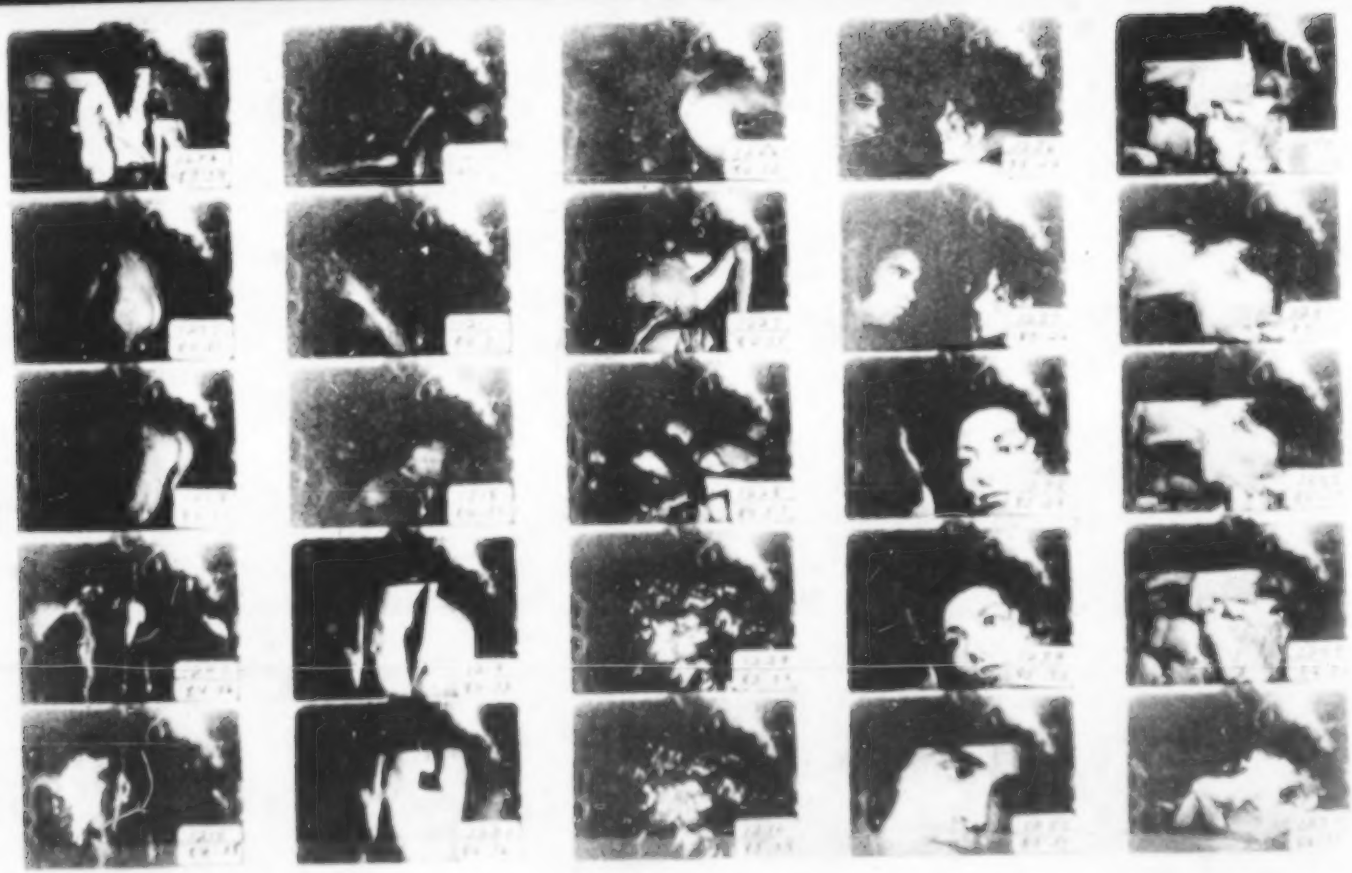
Exhibited at the Mitchell Brothers' Santa Ana Theater from 9/3/75 thru 1/15/76. See Petition at fn. 2 on p 5



FRAMES 1151-1171 FIGHT CONTINUES AND SPACE MAN WINS FIGHT; FRAMES 1172-1200 VARIOUS PEOPLE TALKING--SEXUAL ACTIVITY BETWEEN GROUPS OF MALES AND FEMALES.

Sodom and Gomorrah
(Part 25 of 30 Parts)

Exhibited at the Mitchell Brothers' Santa Ana Theater from 9/3/75 thru 1/15/76. See Petition at fn. 2 on p 5



FRAMES 1201-1242 GROUP OF MALES AND FEMALES ENGAGING IN VARIOUS SEXUAL ACTIVITY;
FRAMES 1243-1250 FELLATIO.

Sodom and Gomorrah
(Part 26 of 30 Parts)

Exhibited at the Mitchell Brothers' Santa Ana Theater from 9/3/75 thru 1/15/76. See Petition at fn. 2 on p. 5

FRAMES 1251-1254 FELIATIO; FRAMES 1255-1293 SEXUAL INTERCOURSE; FRAMES 1294-1300 MALE AND FEMALE TALKING.

Sodom and Gomorrah
(Part 27 of 30 Parts)

Exhibited at the Mitchell Brothers' Santa Ana Theater from 9/3/75 thru 1/15/76. See Petition at fn. 2 on p 5

FRAMES 1301-1339 KING OF SODOM AND FEMALE TALKING ABOUT INTERCOURSE. HE DISOBEYS HIS OWN LAW OF HAVING INTERCOURSE AND ENGAGES IN SEXUAL INTERCOURSE WITH FEMALE; FRAMES 1340-1341 MONKEY IN SPACE SHIP, DISTURBED BY THE LAW BEING BROKEN; FRAMES 1342-1350 OUTDOOR SCENES.

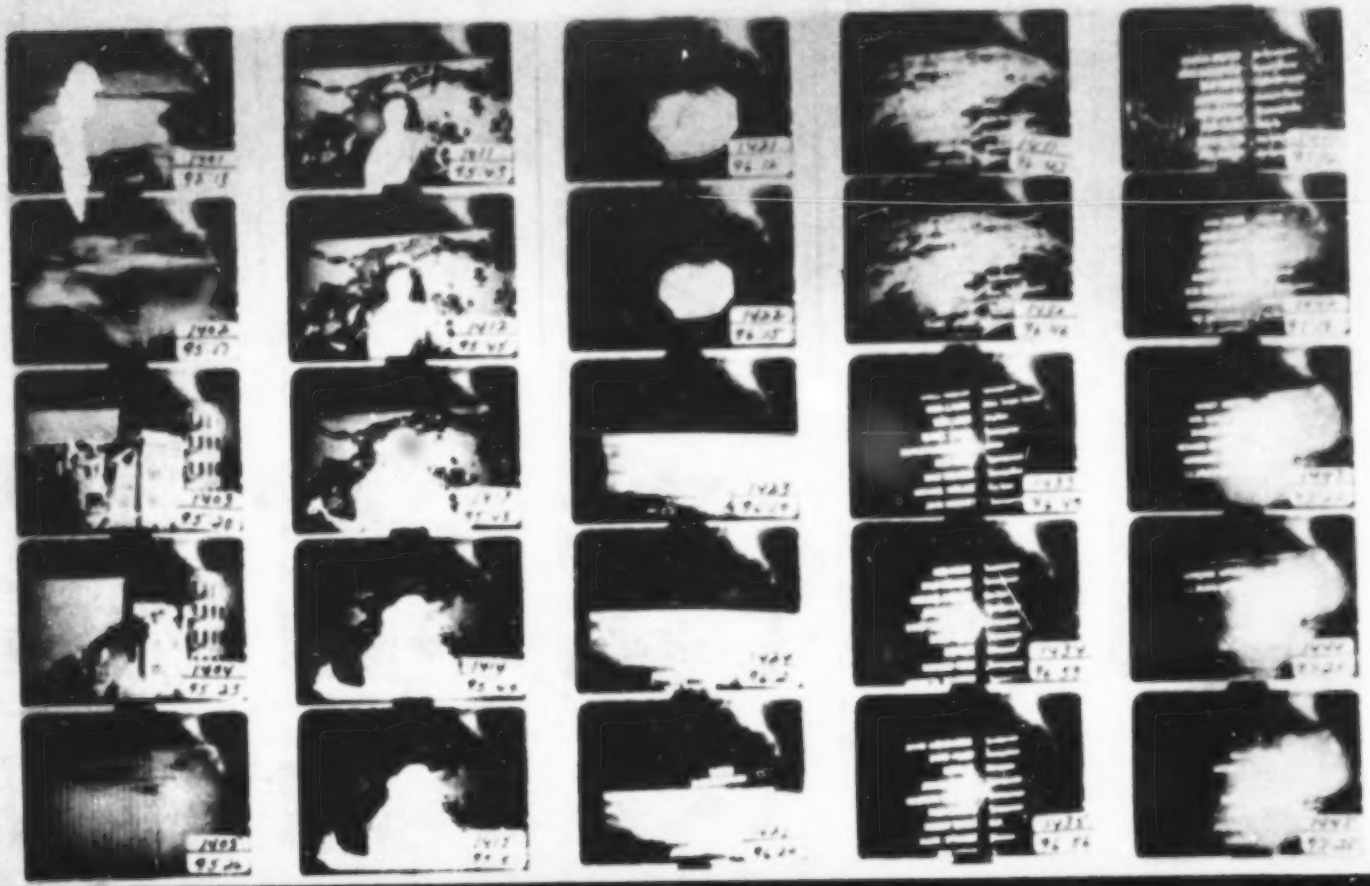
Sodom and Gomorrah
(Part 28 of 30 Parts)

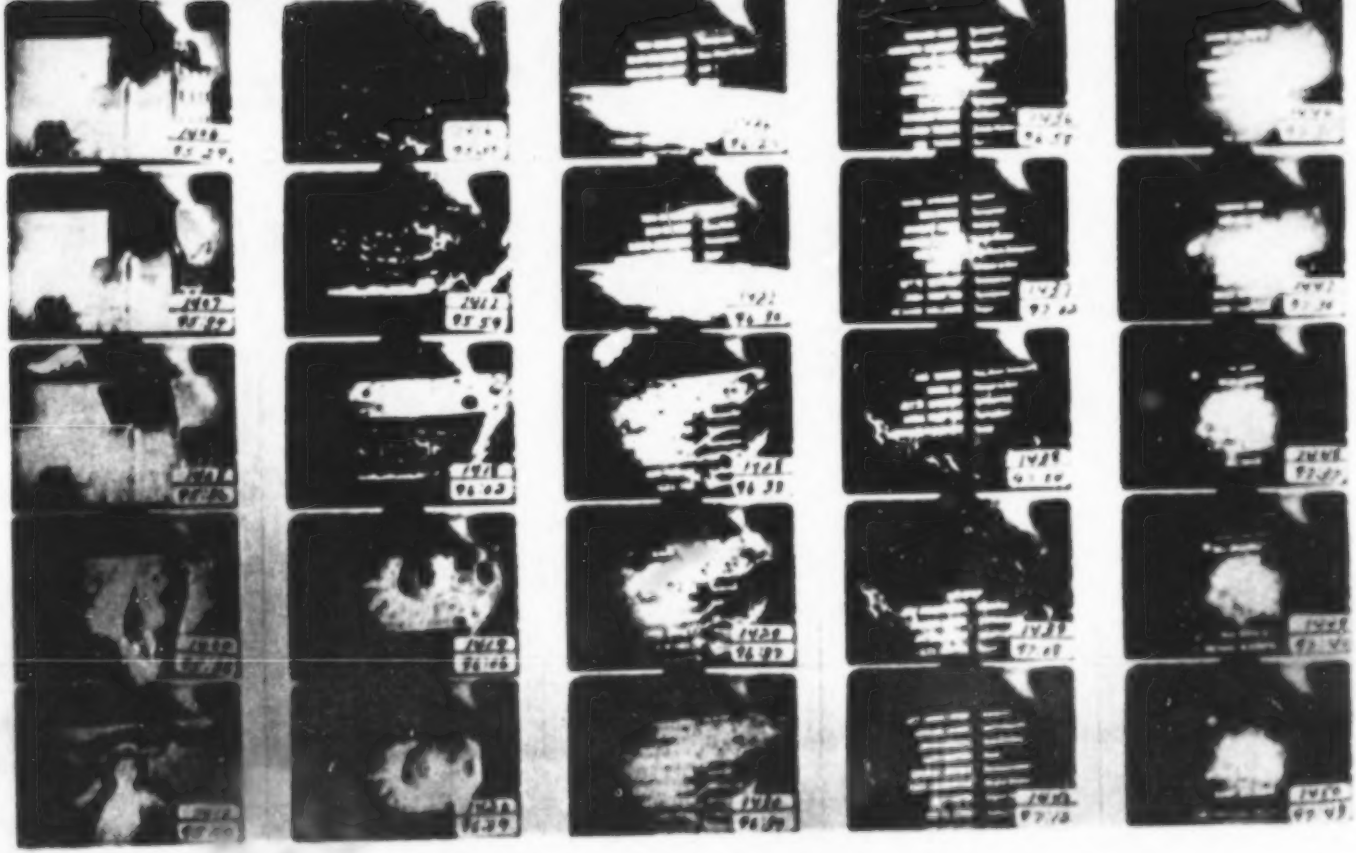
Exhibited at the Mitchell Brothers' Santa Ana Theater from 9/3/75 thru 1/15/76. See Petition at fn. 2 on p. 5

FRAMES 1351-1396 PEOPLE TALKING, FLASHBACK TO MONKEY IN SPACE SHIP. MONKEY DECIDES TO DESTROY SODOM; FRAMES 1397-1399 ATOMIC BOMB BLAST.

Sodom and Gomorrah
(Part 29 of 30 Parts)

Exhibited at the Mitchell Brothers' Santa Ana Theater from 9/3/75 thru 1/15/76. See Petition at fn. 2 on p 5

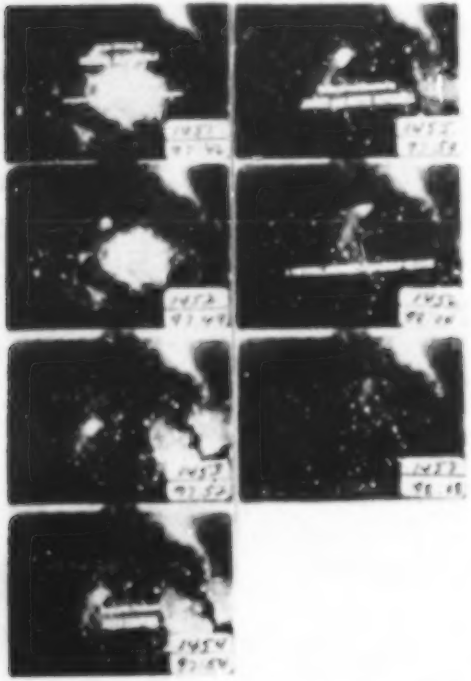




FRAMES 1401-1408 BUILDINGS COLLAPSE; FRAMES 1410-1415 LOT'S WIFE LOOKS BACK AND TURNS INTO A PILLAR OF SALT; FRAMES 1416-1422 SCENES OF SPACE SHIP; FRAMES 1423-1450 THE END AND CREDITS.

Sodom and Gomorrah
(Part 30 of 30 Parts)

Exhibited at the Mitchell Brothers' Santa Ana Theater from 9/3/75 thru 1/15/76. See Petition at fn. 2 on p 5



FRAMES 1451-1457 THE END AND CREDITS.

APPENDIX H

(Reference: Petition at pg. 5, fn. 2
20, fn. 3
44.)

Time and Motion Study of Film "Resurrection of Eve" exhibited at the Mitchell Brothers' Santa Ana Theater as a part of a triple feature from September 3, 1975 thru January 15, 1976.

.....H-1 Thru H-39

APPENDIX H

TIME-MOTION STUDY OF FILM

"RESURRECTION OF EVE"*

Exhibited at the Mitchell Brothers' Santa Ana Theater from 9/3/75 thru 1/15/76 (as part of a triple feature) and pleaded as Exhibits 1, 2 and 3 to the First Amended and Supplemental Complaint. See Petition at fn. 2 on page 5.

* A time-motion study is a chronological series of still photographs of a motion picture film, timed in their relative order of appearance, which, by "stopping" the movement appearing on the motion picture screen and recording the same, permits the type of conduct being portrayed thereon to be analyzed in a fair and accurate manner.

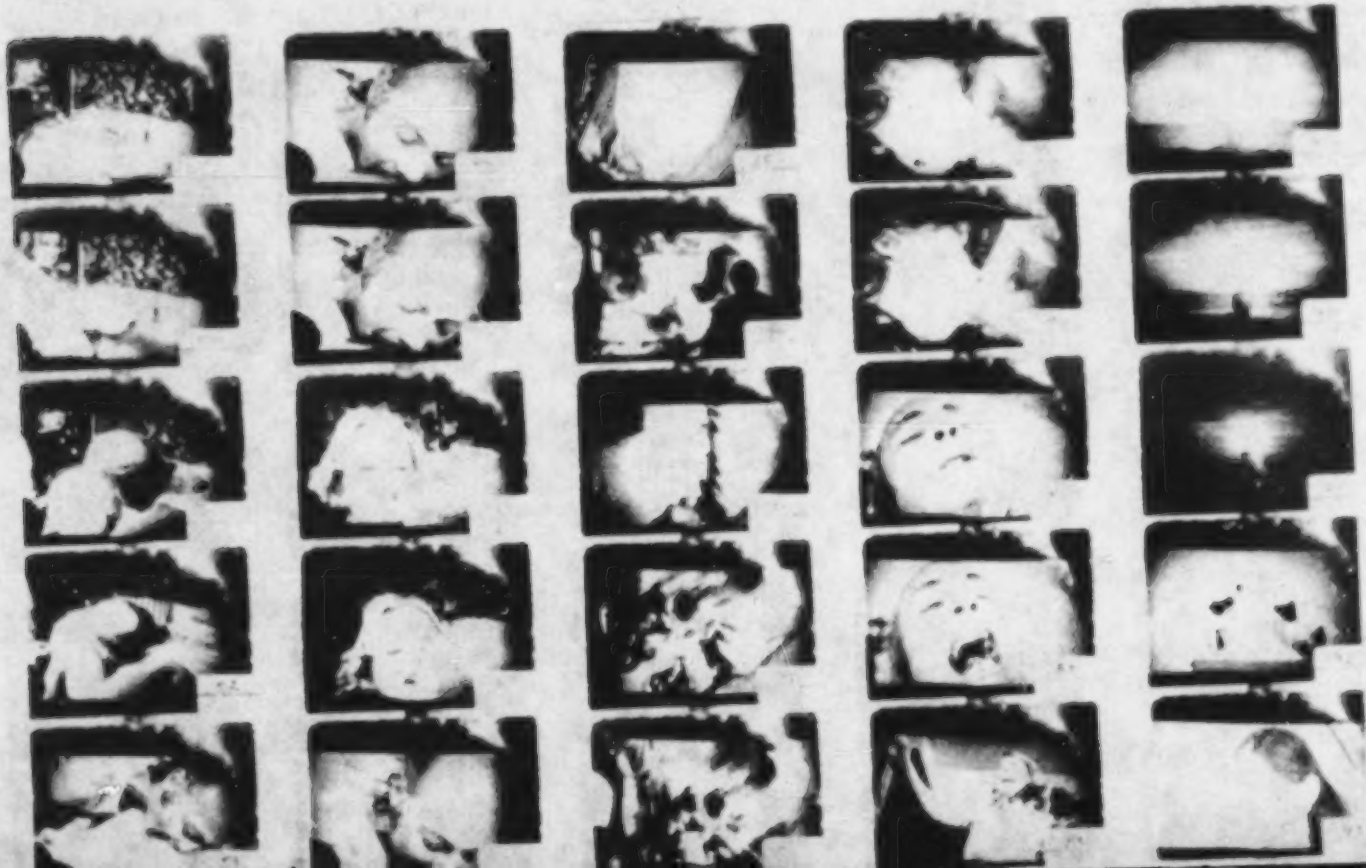
Resurrection of Eve
(Part 1 of 19 Parts)

Exhibited at the Mitchell Brothers' Santa Ana Theater from 9/3/75 thru 1/15/76. See Petition at fn. 2 on p 5

FRAMES 1-3 CREDIT AND TITLE; FRAME 5 PRODUCER'S PREFACE TO STORY; FRAMES 6-8 GIRL AT SEASHORE FACES HORIZON; FRAMES 9-10 SAILOR AND GIRL APPEAR; FRAMES 11-13 WOMAN AT SEASHORE STILL LOOKING OUT TO SEA; FRAMES 14-28 SAILOR TALKS TO YOUNG GIRL IN APARTMENT. TEACHES HER TO KISS WITH HER TONGUE BY USING RAGGEDY ANN DOLL; FRAMES 29-33 SAILOR THEN KISSES GIRL; FRAMES 34-38 SAILOR SHOWS GIRL ACT OF CUNNILINGUS ON RAGGEDY ANN DOLL; FRAMES 39-48 SAILOR LAYS GIRL BACK ON TABLE AND PERFORMS CUNNILINGUS ON HER.

Resurrection of Eve
(Part 2 of 19 Parts)

Exhibited at the Mitchell Brothers' Santa Ana Theater from 9/3/75 thru 1/15/76. See Petition at fn. 2 on p 5

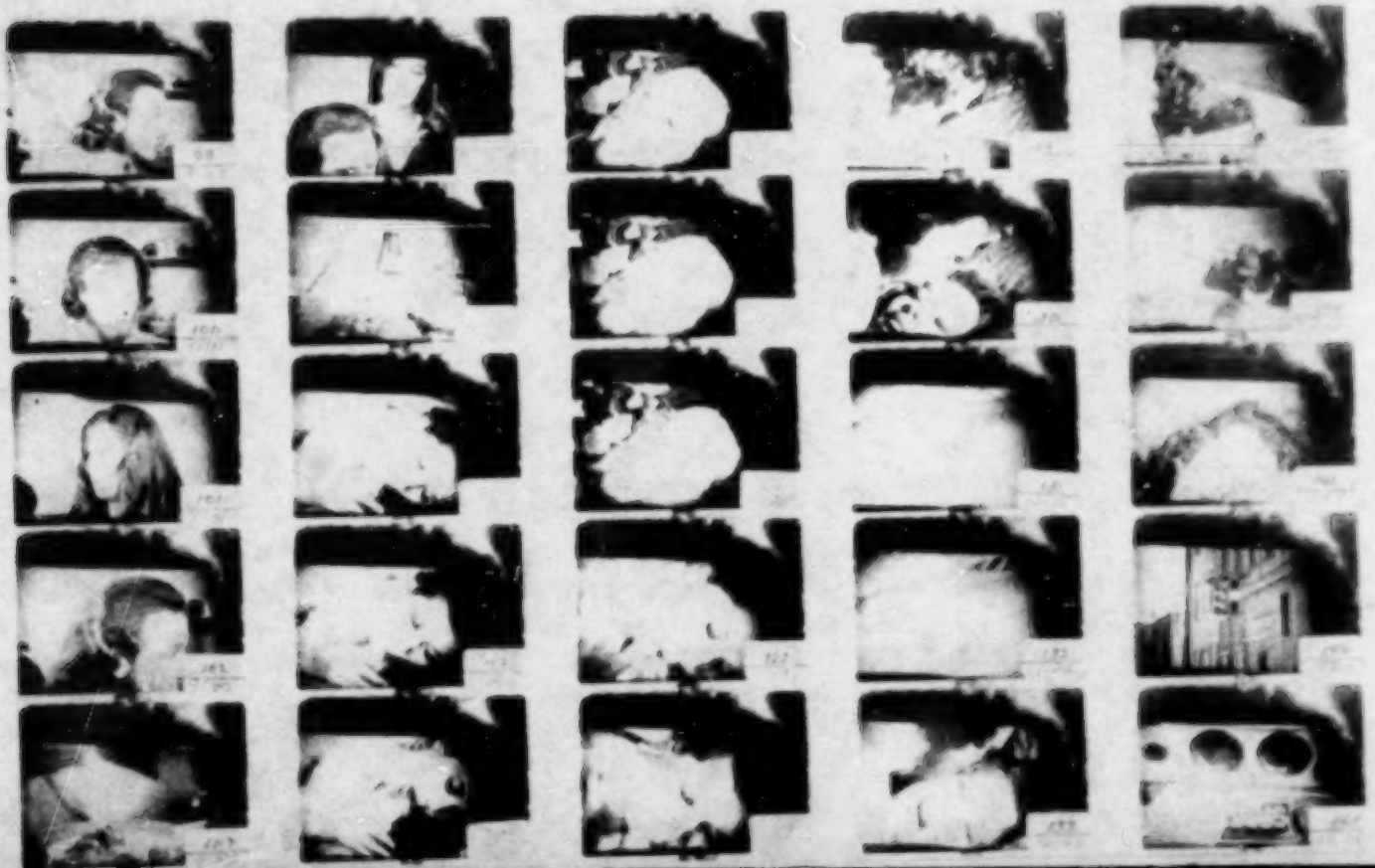


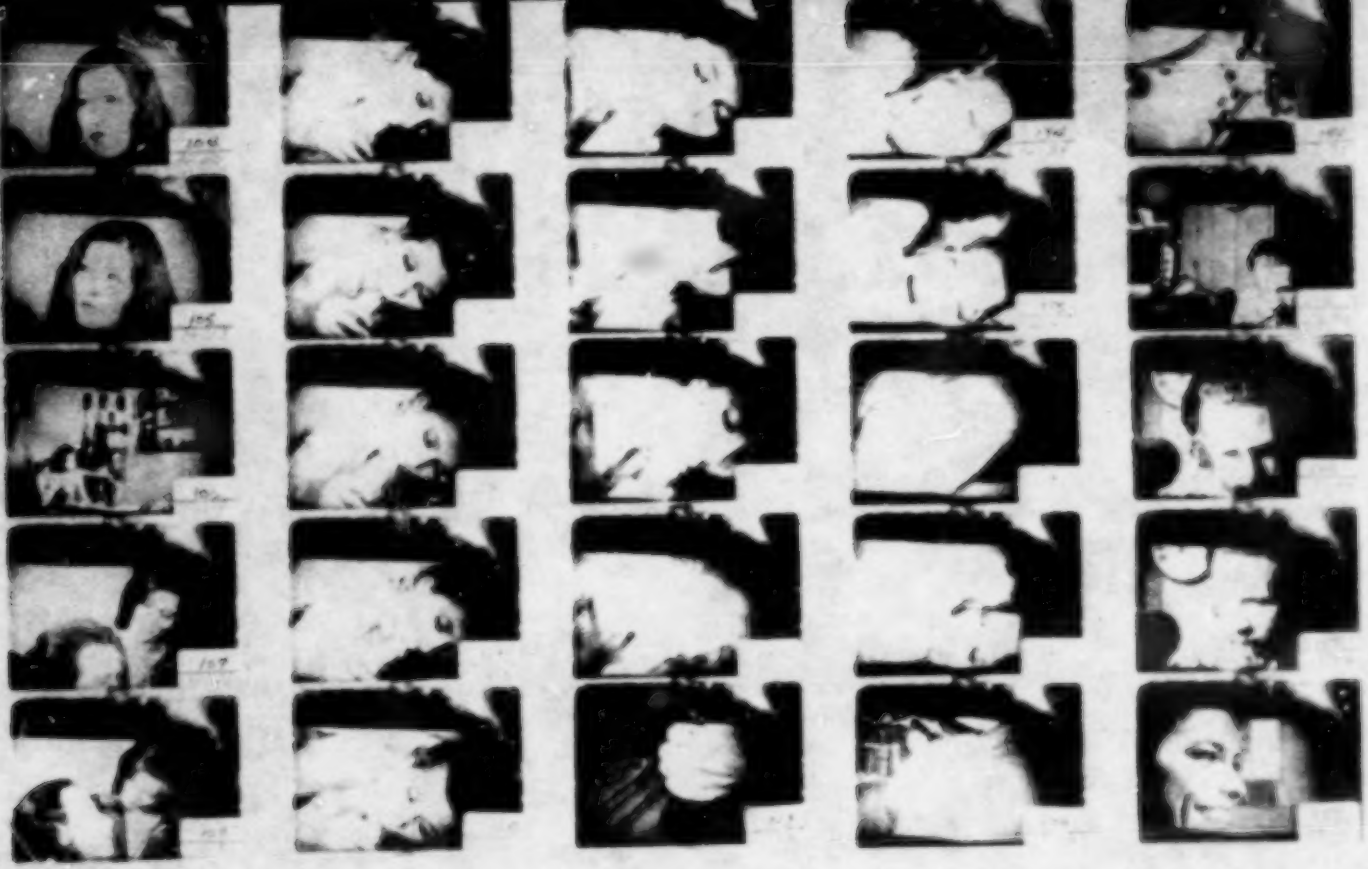
H-4

FRAMES 49-65 CUNNILINGUS CONTINUES; FRAMES 66-82 SAILOR HAS GIRL PERFORM FELLATIO ON HIM; FRAMES 83-85 GIRL'S MOTHER APPEARS, THROWS SAILOR OUT; FRAMES 86-91 FLASH-BACK TO WOMAN AT BEACH REMEMBERING; FRAMES 92-93 HOSPITAL SCENE; FRAMES 94-97 GYM SCENE BLACK FIGHTER AND MANAGER.

Resurrection of Eve
(Part 3 of 19 Parts)

Exhibited at the Mitchell Brothers' Santa Ana Theater from 9/3/75 thru 1/15/76. See Petition at fn. 2 on p 5





FRAMES 99-110 MALE AND FEMALE CONVERSE AT TABLE; FRAMES 111-127 FEMALE PERFORMS FELLATIO ON MALE; FRAMES 128-141 SEXUAL INTERCOURSE, MALE SUPERIOR; FRAMES 142-148 MALE PERFORMS AS DISC JOCKEY ON RADIO.

Resurrection of Eve
(Part 4 of 19 Parts)

Exhibited at the Mitchell Brothers' Santa Ana Theater from 9/3/75 thru 1/15/76. See Petition at fn. 2 on p 5

FRAMES 149-150 FLASHBACK TO HOSPITAL; FRAMES 151-160 FLASHBACK EVE TALKS TO BLACK FIGHTER; FRAME 161 HOSPITAL FLASHBACK; FRAMES 162-166 MALE TELLS GIRLFRIEND THEY ARE THROUGH; FRAMES 167-171 HOSPITAL FLASHBACK; FRAMES 172-184 MALE ANNOYS FEMALE WHO IS WORKING AT RADIO STATION; FRAMES 185-193 SEXUAL INTERCOURSE; FRAMES 194-195 OUTDOOR SCENE; FRAMES 197-198 SEXUAL INTERCOURSE.

Resurrection of Eve
(Part 5 of 19 Parts)

Exhibited at the Mitchell Brothers' Santa Ana Theater from 9/3/75 thru 1/15/76. See Petition at fn. 2 on p 5

FRAMES 199-201 EVE AND FRANK TALK; FRAME 202 BLACK FIGHTER SKIPS ROPE; FRAMES 203-204 HOSPITAL SCENE EVE'S FACE GROTESQUE AND SCARRED; FRAMES 205-206 OUTDOOR BEACH SCENE; FRAMES 207-213 FRANK AND EVE TALK AND EMBRACE; FRAMES 214-216 OUTDOOR PARK SCENE; FRAMES 217-224 CLOSEUP OF MALE FACE BETWEEN FEMALE'S LEGS PERFORMING CUNNILINGUS; FRAMES 225-226 EVE IN HOSPITAL WITH NURSE; FRAMES 227-228 GYM SCENE FIGHTER WORKING OUT; FRAMES 230-244 SEXUAL INTERCOURSE MALE SUPERIOR; FRAMES 245-248 FRANK RETURNS TO RADIO STATION.

Resurrection of Eve
(Part 6 of 19 Parts)

Exhibited at the Mitchell Brothers Santa Ana Theater from 9/3/75 thru 1/15/76. See Petition at fn. 2 on p 5

FRAMES 249-259 FRANK QUARRELS WITH EX-GIRLFRIEND AT STORE COUNTER; FRAME 260 FIGHTER TRAINS; FRAMES 261-275 FRANK WAITS AT APARTMENT FOR EVE; FRAME 276 EVE TELLS HIM SHE SAW BOXING MATCH WITH BLACK FIGHTER; FRAMES 277-287 IN FANTASY FRANK BOXES BLACK FIGHTER; FRAMES 288-298 FRANK AND EVE HAVE SEXUAL INTERCOURSE.

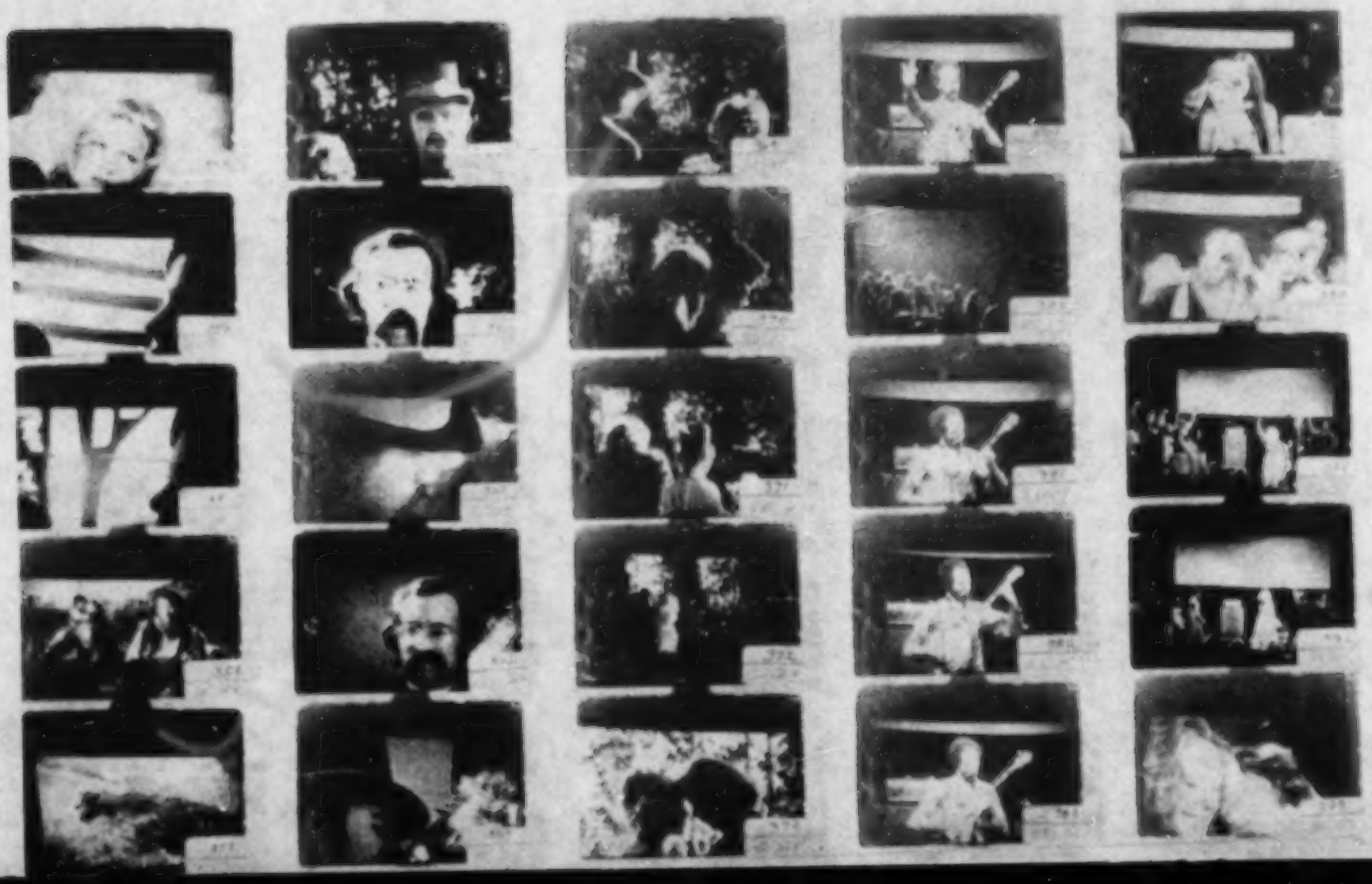
Resurrection of Eve
(Part 7 of 19 Parts)

Exhibited at the Mitchell Brothers' Santa Ana Theater from 9/3/75 thru 1/15/76. See Petition at fn. 2 on p 5

FRAMES 299-337 EVE PERFORMS FELLATIO ON FRANK. SEXUAL INTERCOURSE WITH BLACK FIGHTER--SEXUAL INTERCOURSE WITH FRANK. EVE IS NOT SATISFIED. EVE SCREAMS; FRAMES 338-342 FLASHBACK TO EVE IN HOSPITAL; FRAMES 343-348 FRANK VISITS EVE IN HOSPITAL RECOVERING FROM PLASTIC SURGERY.

Resurrection of Eve
(Part 8 of 19 Parts)

Exhibited at the Mitchell Brothers' Santa Ana Theater from 9/3/75 thru 1/15/76. See Petition at fn. 2 on p 5



FRAMES 350-398 FRANK AND EVE GET MARRIED--MUSICAL GROUP AND DANCERS PERFORM AT CEREMONY.

Resurrection of Eve
(Part 9 of 19 Parts)

Exhibited at the Mitchell Brothers' Santa Ana Theater from 9/3/75 thru 1/15/76. See Petition at fn. 2 on p 5

FRAMES 399-416 BLACK MUSICAL GROUP PERFORMS, FOLLOWED BY MALE SINGER; FRAMES 417-425 FRANK PERFORMS AS DISC JOCKEY; FRAME 426 FRANK AT POOLSIDE; FRAMES 428-446 FRANK AND EVE EMBRACE AND KISS IN BED; FRAMES 447-448 EVE VACUUMS APARTMENT.

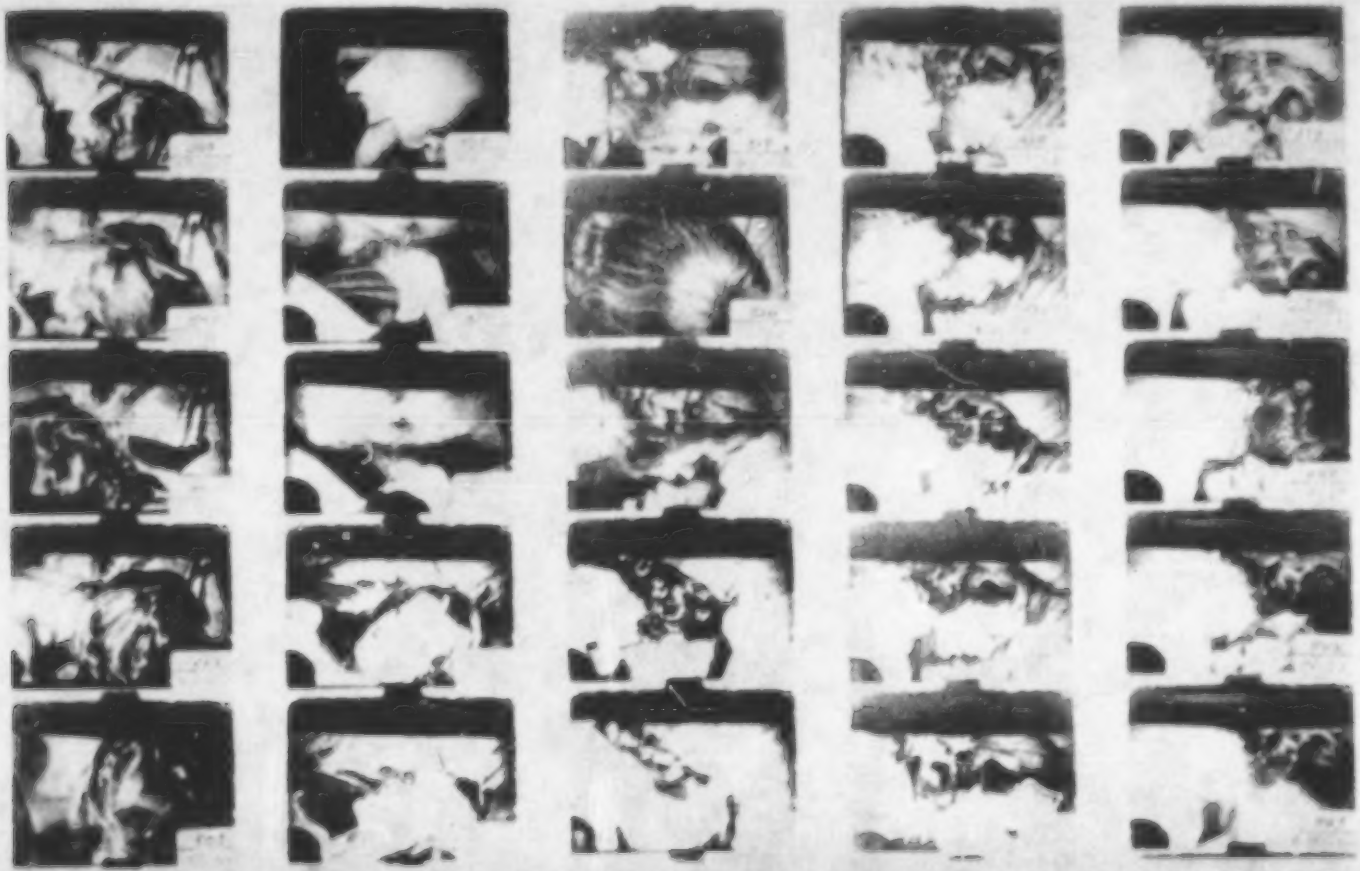
Resurrection of Eve
(Part 10 of 19 Parts)

Exhibited at the Mitchell Brothers' Santa Ana Theater from 9/3/75 thru 1/15/76. See Petition at fn. 2 on p 5

FRAMES 449-498 FRANK AND EVE EMBRACE. THEY STRIP AND KISS AND LIE ON BED.

Resurrection of Eve
(Part 11 of 19 Parts)

Exhibited at the Mitchell Brothers' Santa Ana Theater from 9/3/75 thru 1/15/76. See Petition at fn. 2 on p 5



FRAMES 499-509 EVE PERFORMS FELLATIO ON FRANK; FRAMES 510-548 FRANK MOUNTS EVE IN SEXUAL INTERCOURSE.

Resurrection of Eve
(Part 12 of 19 Parts)

Exhibited at the Mitchell Brothers' Santa Ana Theater from 9/3/75 thru 1/15/76. See Petition at fn. 2 on p 5

FRAMES 549-551 INTERCOURSE CONTINUES; FRAMES 552-557 EVE IS PERSUADED TO JOIN IN GROUP SEX; FRAMES 558-598 MALES AND FEMALES GATHER FOR SEXUAL ACTIVITY--MEMBERS ARE PARTIALLY DRESSED--THEN DISROBE AND ENGAGE IN VARIOUS ACTS IN SEXUAL ORGY.

Resurrection of Eve
(Part 13 of 19 Parts)

Exhibited at the Mitchell Brothers' Santa Ana Theater from 9/3/75 thru 1/15/76. See Petition at fn. 2 on p 5

FRAMES 599-631 SEX ORGY CONTINUES. FELLATIO BY FEMALE ON MALE, MASTURBATION, CUNNILINGUS, SEXUAL INTERCOURSE; FRAMES 632-636 EVE SEES FRANK HAVE INTERCOURSE WITH ANOTHER FEMALE; FRAMES 637-648 EVE AND FRANK QUARREL.

Resurrection of Eve
(Part 14 of 19 Parts)

Exhibited at the Mitchell Brothers' Santa Ana Theater from 9/3/75 thru 1/15/76. See Petition at fn. 2 on p 5

FRAMES 649-654 EVE APOLOGIZES; FRAMES 655-698 SEX ORGY--FELLATIO; SEXUAL INTERCOURSE; LESBIANISM; MASTURBATION; SEXUAL INTERCOURSE.

Resurrection of Eve
(Part 15 of 19 Parts)

Exhibited at the Mitchell Brothers' Santa Ana Theater from 9/3/75 thru 1/15/76. See Petition at fn. 2 on p 5

FRAMES 699-714 EVE IN KITCHEN. FRANK TELLS EVE TO GET RID OF HER HANGUPS; FRAMES 715-748 SCENES ALTERNATE BETWEEN PARTY SCENES AND EVE PERFORMING FELLATIO AND EVE AT HOME.

Resurrection of Eve
(Part 16 of 19 Parts)

Exhibited at the Mitchell Brothers' Santa Ana Theater from 9/3/75 thru 1/15/76. See Petition at fn. 2 on p 5

FRAMES 749-758 EVE COLLAPSES ON BED. FRANK IS DISGUSTED; FRAMES 759-777 FRANK GOES TO STATION TO WORK. EVE ACCEPTS PHONE INVITATION TO GROUP SEX PARTY; FRAMES 781-798 SEX PARTY--FEMALE PERFORMING FELLATIO, CUNNILINGUS PERFORMED ON EVE; LESBIANISM; SEXUAL INTERCOURSE.

Resurrection of Eve
(Part 17 of 19 Parts)

Exhibited at the Mitchell Brothers' Santa Ana Theater from 9/3/75 thru 1/15/76. See Petition at fn. 2 on p 5

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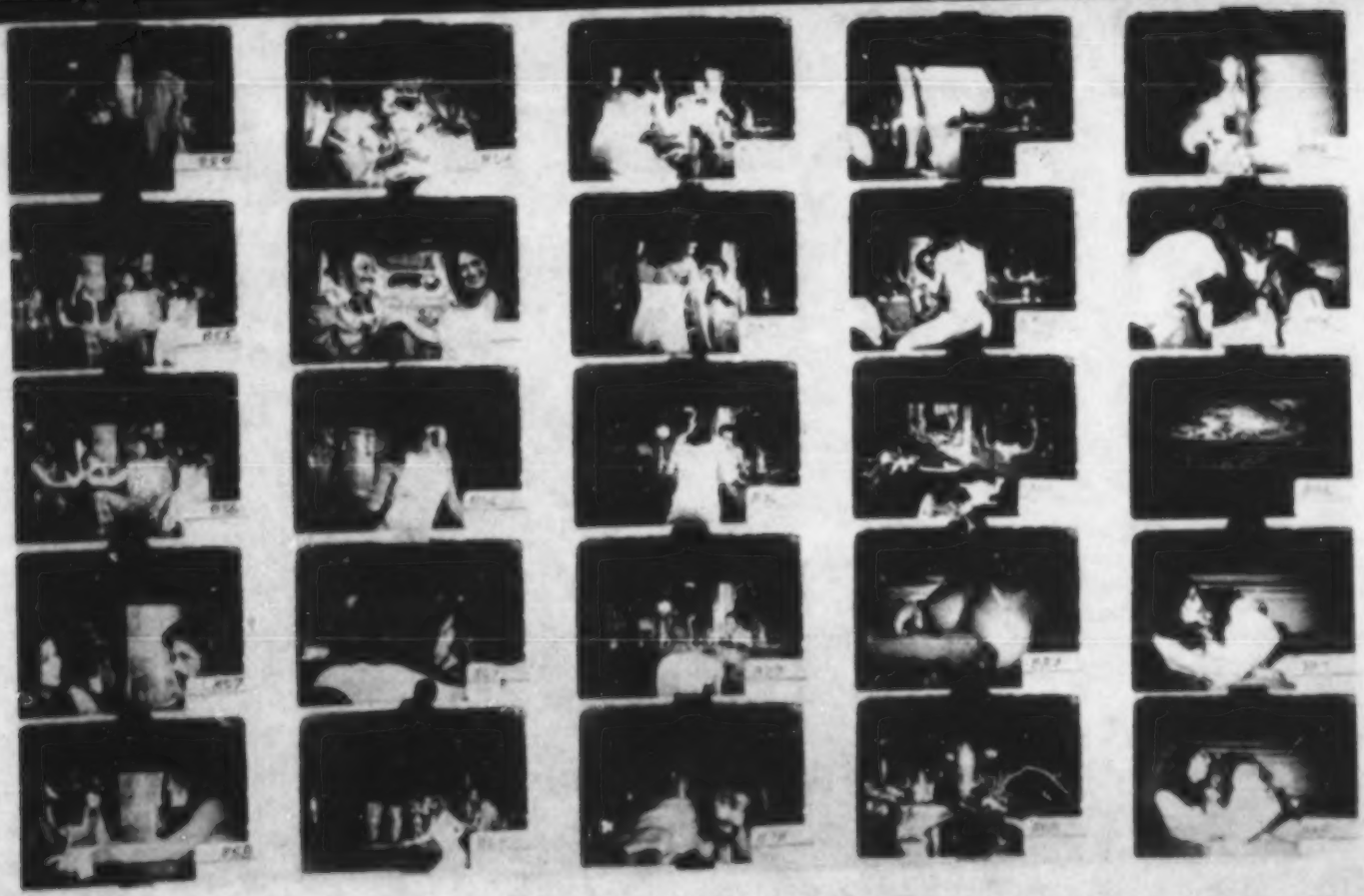
FRAMES 799-810 LESBIANISM, SEXUAL INTERCOURSE, CUNNILINGUS; FRAMES 811-813 GROUP SEX ORGY; FRAMES 814-819 PENIS EJACULATES IN MOUTH OF FEMALE; FRAMES 820-834 GROUP SEX, CLOSEUP OF SEMEN EJACULATING FROM MALE PENIS; FRAMES 835-848 PARTY SCENE.

Resurrection of Eve
(Part 18 of 19 Parts)

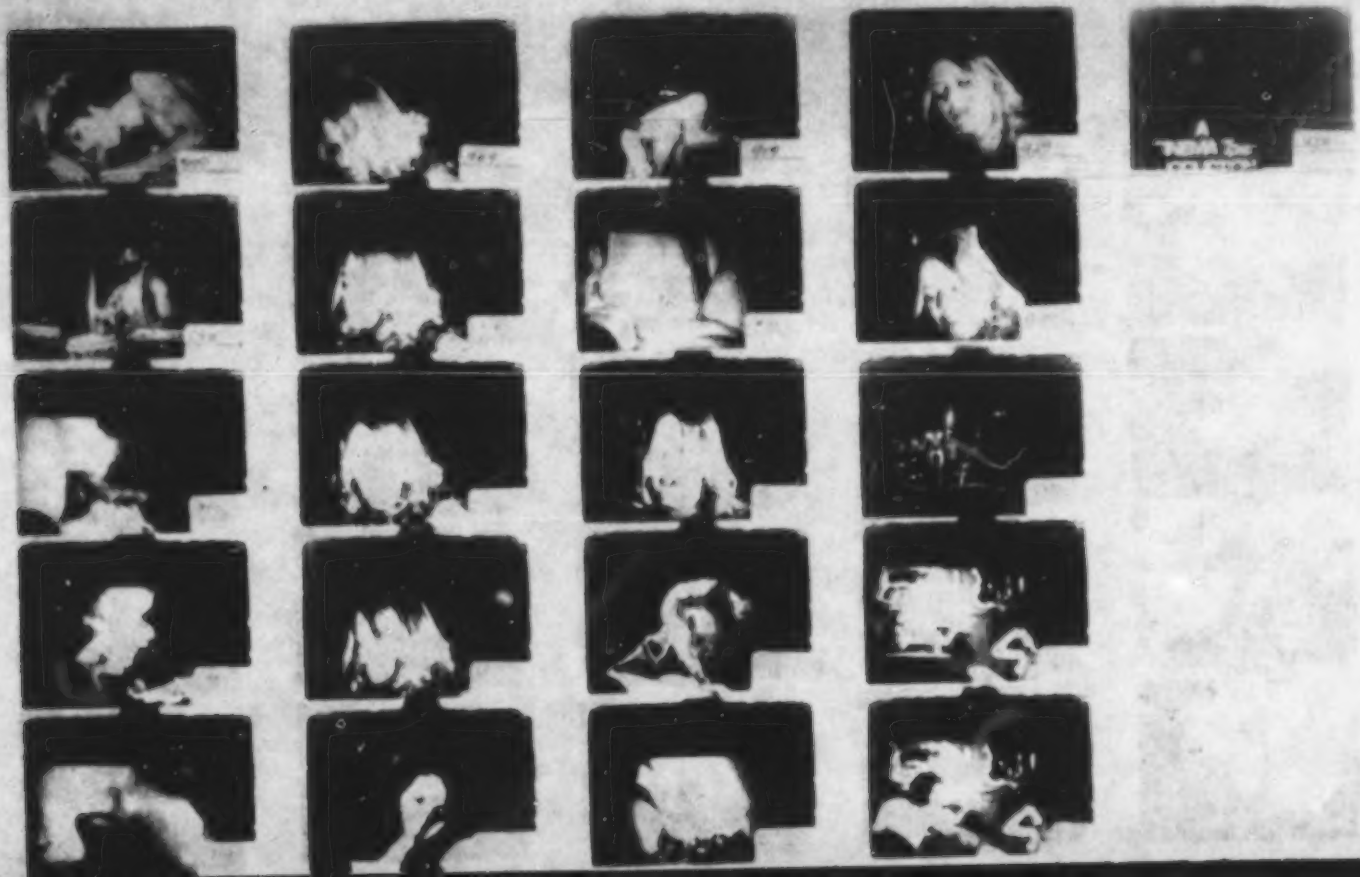
Exhibited at the Mitchell Brothers' Santa Ana Theater from 9/3/75 thru 1/15/76. See Petition at fn. 2 on p 5



FRAMES 849-860 SEX ORGY PARTY. FELLATIO; SEXUAL INTERCOURSE; FRAMES 861-885 EVE IS DISROBED BY BLACK FIGHTER. HE FONDLES HER BREASTS. EVE MOUNTS FIGHTER IN SEXUAL INTERCOURSE WHILE HE IS SEATED; FRAMES 886-898 GROUP SEX, LESBIANISM.

Resurrection of Eve
(Part 19 of 19 Parts)

Exhibited at the Mitchell Brothers' Santa Ana Theater from 9/3/75 thru 1/15/76. See Petition at fn. 2 on p 5



FRAMES 899-938 SEXUAL INTERCOURSE, FELLATIO, SEXUAL ORGY TO END.

APPENDIX I

(Reference: Petition at pg. 5, fn. 2
20, fn. 3
44.)

Time and Motion Study of Film "Behind the Green Door" exhibited at the Mitchell Brothers' Santa Ana Theater as a part of a triple feature from September 3, 1975 thru January 15, 1976.

.....I-1 Thru I-29

APPENDIX I

TIME-MOTION STUDY OF FILM

"BEHIND THE GREEN DOOR"*

Exhibited at the Mitchell Brothers' Santa Ana Theater from 9/3/75 thru 1/15/76 (as part of a triple feature) and pleaded as Exhibits 1, 2 and 3 to the First Amended and Supplemental Complaint. See Petition at fn. 2 on page 5.

* A time-motion study is a chronological series of still photographs of a motion picture film, timed in their relative order of appearance, which, by "stopping" the movement appearing on the motion picture screen and recording the same, permits the type of conduct being portrayed thereon to be analyzed in a fair and accurate manner.

Behind the Green Door
(Part 1 of 14 Parts)

Exhibited at the Mitchell Brothers' Santa Ana Theater from 9/3/75 thru 1/15/76. See Petition at fn. 2 on p 5

FRAME 1 FILM TITLE "BEHIND THE GREEN DOOR"; FRAMES 3-15 TWO MEN SEATED AT DINNER TABLE WITH CHEF AS WAITRESS SERVES THEM; FRAMES 16-19 OLDER MAN RELATES STORY FLASH-BACK; FRAMES 20-32 A SMALL SPORTS CAR CONVERTIBLE WITH GIRL DRIVING APPEARS TRAVEL-ING ON WINDING ROAD AS FILM CREDITS APPEAR; FRAMES 33-36 GIRL ARRIVES AT RESORT AND IS GREETED BY MAN BEHIND COUNTER; FRAMES 37-50 TWO MEN FROM DINER ARE SEATED AND TALKING IN OUTDOOR DINING AREA, GIRL SITS AT NEARBY TABLE.

Behind the Green Door
(Part 2 of 14 Parts)

Exhibited at the Mitchell Brothers' Santa Ana Theater from 9/3/75 thru 1/15/76. See Petition at fn. 2 on p 5

FRAMES 51-62 MEN CONTINUE CONVERSATION AS GIRL AT OTHER TABLE SIPS DRINK; FRAMES 63-66 NITE SCENE. WOMAN DESCENDS STAIRCASE. CAR PULLS UP IN ALLEY AND TWO MEN FORCE WOMAN INTO CAR AND DRIVE OFF; FRAMES 67-81 TWO MEN ENTER LARGE FOYER OF NIGHT CLUB AND ARE MET BY LARGE THIRD MAN. LARGE MAN BURSTS FOOTBALL IN HIS HANDS AFTER ASKING MEN THEIR NAMES. TWO MEN PUT ON MASKS AND ARE DIRECTED TO SEATS BY A WOMAN; FRAMES 82-87 CLOWN PERFORMS ON STAGE WHILE AUDIENCE WATCHES; FRAMES 88-92 CAR PULLS UP IN ALLEY TWO MALE ABDUCTORS AND GIRL ENTER BUILDING; FRAMES 93-100 CAPTIVE GIRL IS MET BY A WOMAN WHO ORDERS MEN TO LEAVE.

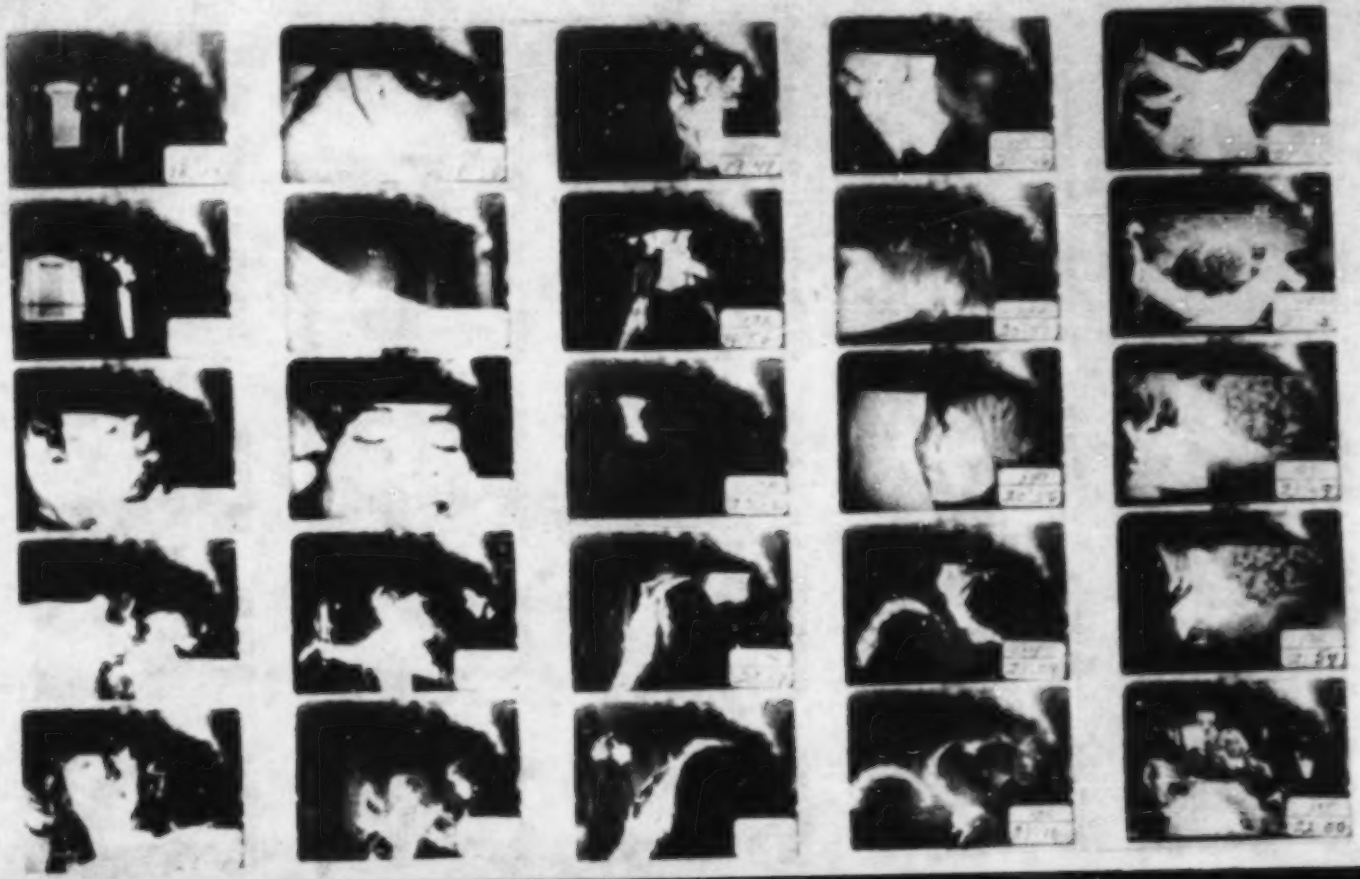
Behind the Green Door
(Part 3 of 14 Parts)

Exhibited at the Mitchell Brohters' Santa Ana Theater from 9/3/75 thru 1/15/76. See Petition at fn. 2 on p 5

FRAMES 101-128 SECOND WOMAN TALKS TO ABDUCTED GIRL--TRIES TO CALM AND SOOTH HER ANXIETY BY TALKING AND FONDLING HER; FRAMES 129-146 CLOWN PUTS ON MAKE-UP AND PERFORMS ON STAGE AS AUDIENCE WATCHES; FRAMES 147-150 DOOR ON SIDE OF STAGE OPENS AND GIRL VICTIM IS LED ON STAGE.

Behind the Green Door
(Part 4 of 14 Parts)

Exhibited at the Mitchell Brothers' Santa Ana Theater from 9/3/75 thru 1/15/76. See Petition at fn. 2 on p 5



FRAMES 151-170 GIRL IS DISROBED BY OTHER WOMEN AND FONDLED AND KISSED AS AUDIENCE WATCHES; FRAMES 171-185 GIRL IS RESTRAINED BY SEVERAL WOMEN AS ANOTHER WOMAN PERFORMS CUNNILINGUS ON HER; FRAMES 186-200 CAMERA SHIFTS FROM VICTIM TO AUDIENCE AND BACK SHOWING AUDIENCE REACTION.

Behind the Green Door (Part 5 of 14 Parts) Exhibited at the Mitchell Brothers' Santa Ana Theater from 9/3/75 thru 1/15/76. See Petition at fn. 2 on p 5

FRAMES 200-240 AUDIENCE CONTINUES TO WATCH AS GIRL VICTIM IS HELD SPREAD EAGLE ON HER BACK ON STAGE FLOOR AS SEVERAL OTHER FEMALES KISS AND SUCK HER BREASTS AND ANOTHER FEMALE PERFORMS CUNNILINGUS ON HER; FRAMES 241-250 BLACK MALE ENTERS STAGE WITH PENIS EXPOSED THROUGH PANTS WITH CUTOUT, AND APPROACHES RESTRAINED VICTIM ON FLOOR. OTHER WOMEN DIRECT MALE TO VICTIM'S VAGINA.

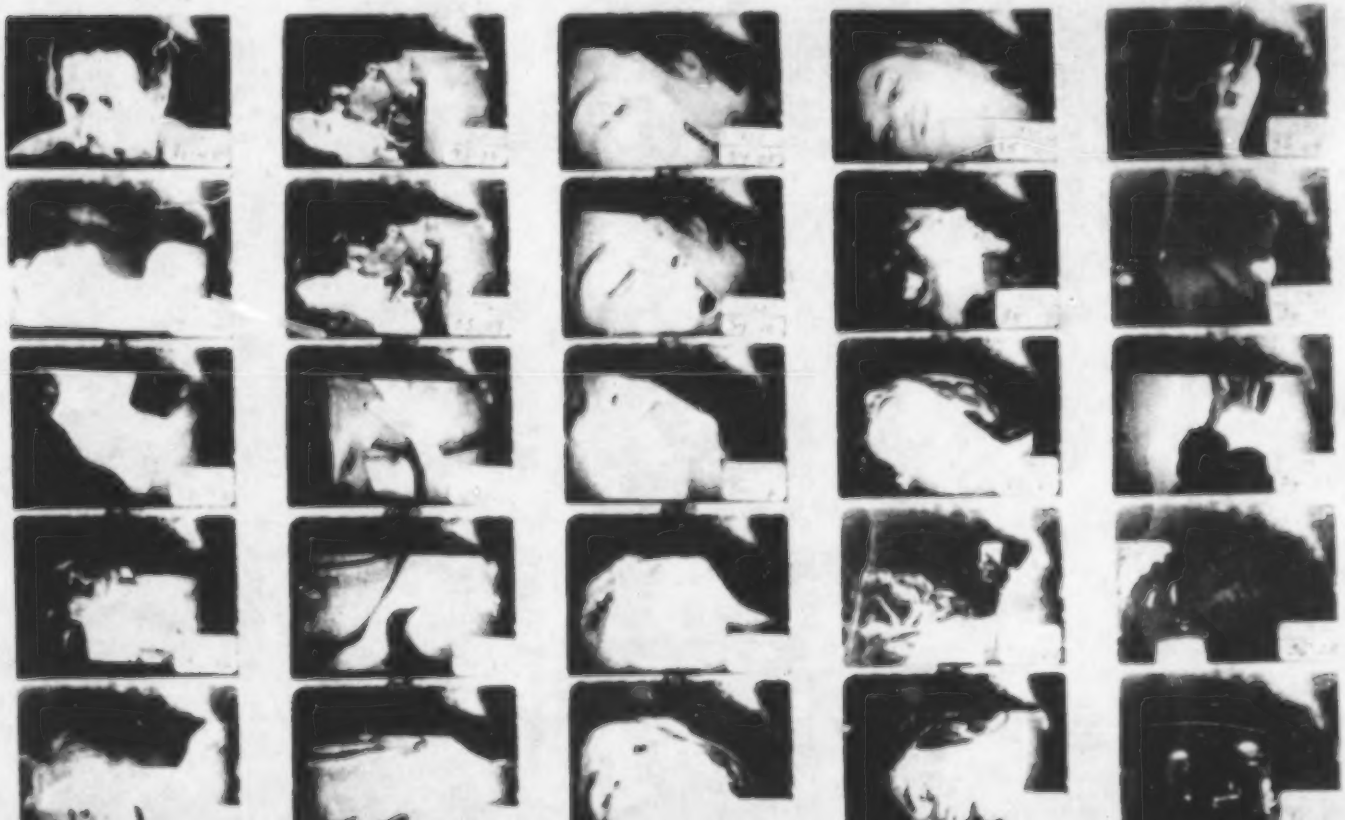
Behind the Green Door
(Part 6 of 14 Parts)

Exhibited at the Mitchell Brothers' Santa Ana Theater from 9/3/75 thru 1/15/76. See Petition at fn. 2 on p 5

FRAMES 251-268 WOMEN HOLD VICTIM ON FLOOR AS MALE PERFORMS CUNNILINGUS ON HER AS AUDIENCE WATCHES; FRAMES 269-300 CLOSEUP OF MALE PENIS ENTERING VAGINA OF VICTIM. MALE PERFORMS SEXUAL INTERCOURSE WHILE FEMALE WRITHES ON FLOOR STILL HELD BY OTHER FEMALES.

Behind the Green Door
(Part 7 of 14 Parts)

Exhibited at the Mitchell Brothers' Santa Ana Theater from 9/3/75 thru 1/15/76. See Petition at fn. 2 on p 5



FRAMES 301-338 MALE PERFORMS SEXUAL INTERCOURSE TO RYTHM OF BONGO DRUMS BRINGING VICTIM TO CLIMAX; FRAMES 339-340 CAMERA SHOWS AUDIENCE REACTION--ONE WOMAN MASTURBATES; FRAMES 341-350 BLACK MALE EXITS STAGE. AUDIENCE ANTICIPATES NEXT ACT.

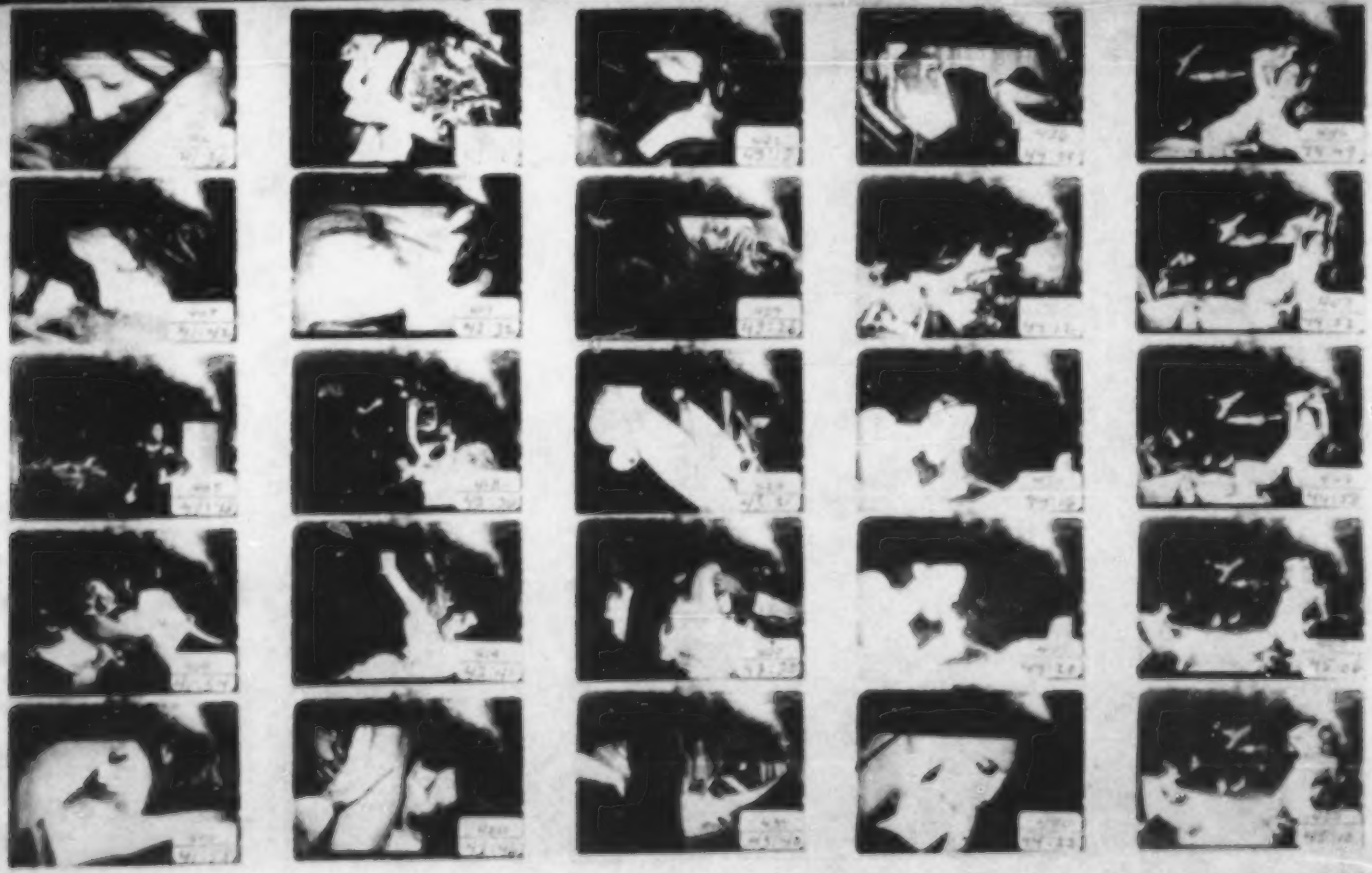
Behind the Green Door (Part 8 of 14 Parts)

Exhibited at the Mitchell Brothers' Santa Ana Theater from 9/3/75 thru 1/15/76. See Petition at fn. 2 on p 5

FRAMES 351-365 THREE MAN TRAPEZE DEVICE IS LOWERED FROM CEILING. THREE MEN MOUNT IT WITH PENISES EXPOSED; FRAMES 366-371 CLOSEUP OF WOMAN IN AUDIENCE MASTURBATING WITH HER FINGERS WHILE VIEWING STAGE ACTIVITY; FRAMES 372-386 VICTIM IS TAKEN TO CENTER OF TRAPEZE WITH THREE MALES. SHE THEN MASTURBATES TWO MALES WHILE ALSO PERFORMING FELLATIO ON THIRD MALE; FRAMES 387-390 ANOTHER FEMALE IN AUDIENCE FONDLES HER OWN BREASTS AS SHE VIEWS STAGE; FRAMES 391-400 VICTIM CONTINUES TO MASTURBATE TWO MALES WHILE PERFORMING FELLATIO ON THIRD MALE, WHILE FOURTH MALE PERFORMS SEXUAL INTERCOURSE ON HER FROM BENEATH HER.

Behind the Green Door
(Part 9 of 14 Parts)

Exhibited at the Mitchell Brothers' Santa Ana Theater from 9/3/75 thru 1/15/76. See Petition at fn. 2 on p 5



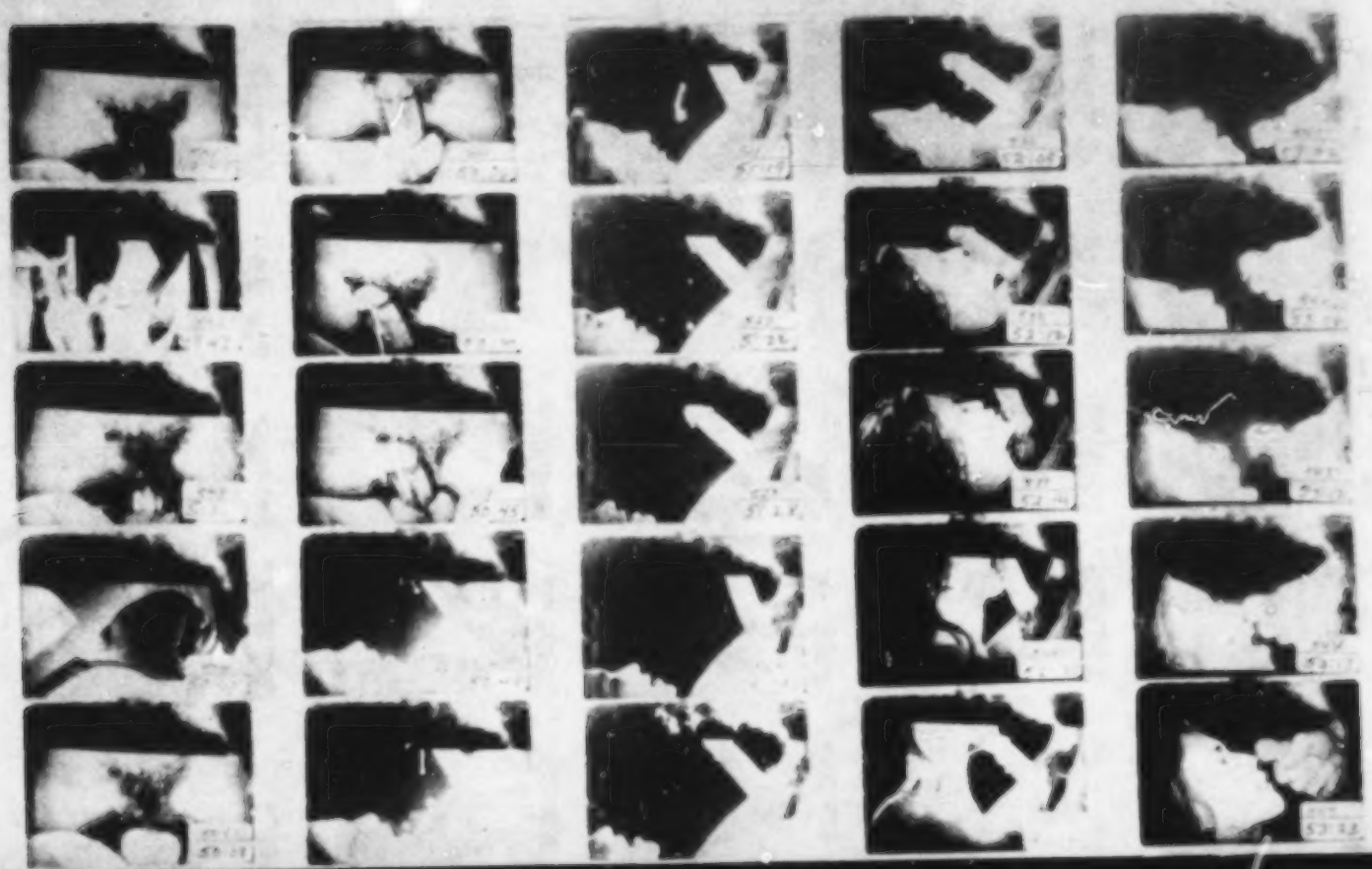
FRAMES 401-407 SEXUAL INTERCOURSE-CUNNILINGUS; FRAMES 408-450 AUDIENCE ENGAGES IN SEXUAL ACTIVITY. MASTURBATION, CUNNILINGUS, FELLATIO, GROUP ORGY.

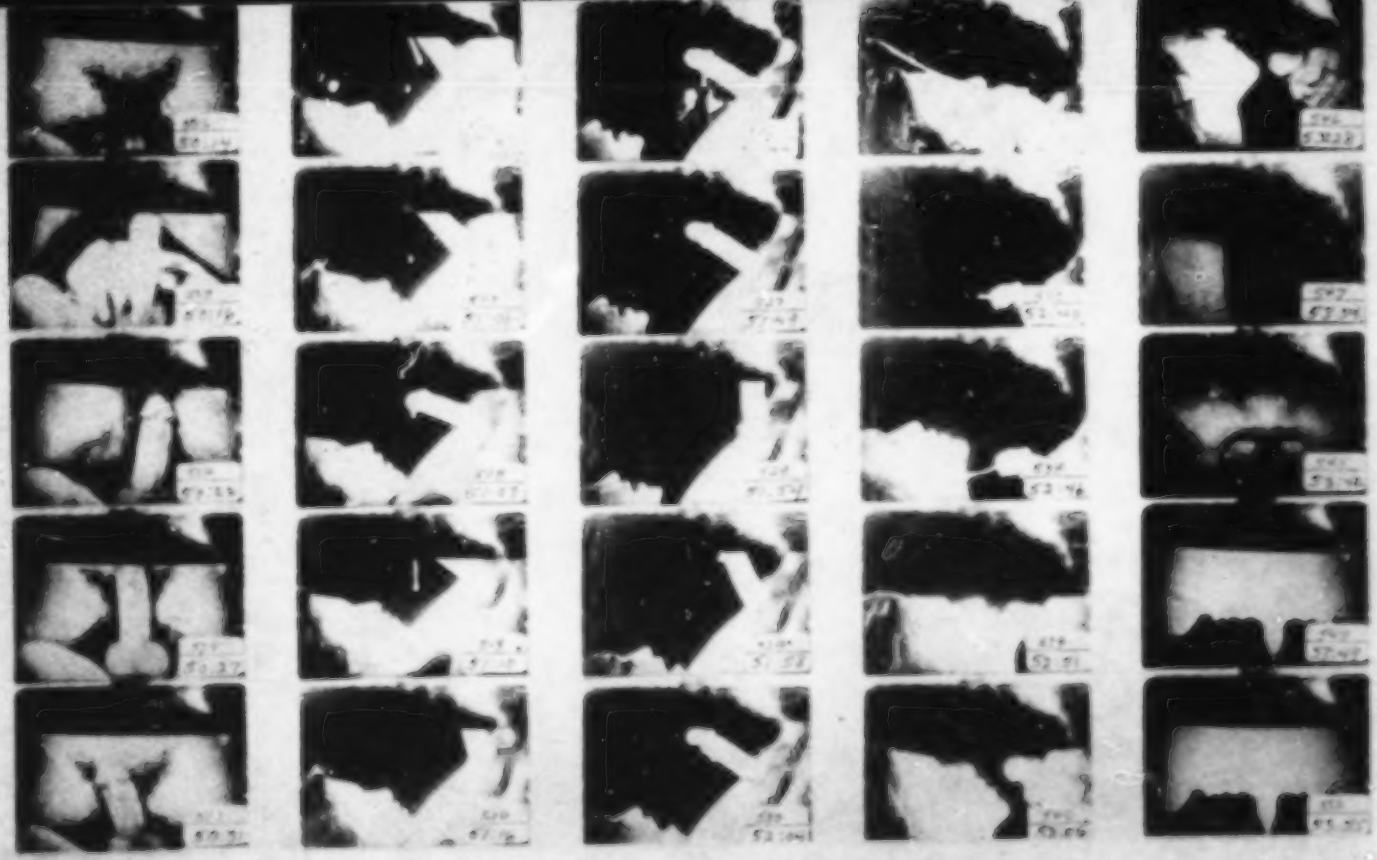
Behind the Green Door
(Part 10 of 14 Parts)

Exhibited at the Mitchell Brothers' Santa Ana Theater from 9/3/75 thru 1/15/76. See Petition at fn. 2 on p 5

FRAMES 451-478 BLACK MALE PERFORMS SEXUAL INTERCOURSE ON GIRL VICTIM THEN MASTURBATES HER VAGINA; FRAMES 479-500 FELLATIO, CUNNILINGUS, SEX ORGY CONTINUES.

Behind the Green Door (Part 11 of 14 Parts) Exhibited at the Mitchell Brothers' Santa Ana Theater from 9/3/75 thru 1/15/76. See Petition at fn. 2 on p 5





FRAMES 501-513 CLOSEUP OF SEXUAL INTERCOURSE, PENIS EJACULATES ON FEMALE PUBIC HAIR;
FRAMES 514-550 FEMALE PLACES FACE BENEATH PENIS AS IT EJACULATES, SEMEN DRIPS ON FEMALE VICTIM'S MOUTH AND THROAT. SHE THEN LICKS SEMEN FROM BLACK PENIS. MALE THEN RUBS SEMEN FROM PENIS ON FEMALE'S NOSE AND MOUTH.

Behind the Green Door
(Part 12 of 14 Parts)

Exhibited at the Mitchell Brothers' Santa Ana Theater from 9/3/75 thru 1/15/76. See Petition at fn. 2 on p 5

FRAMES 551-566 SPECIAL EFFECTS PHOTOGRAPHY--PENIS EJACULATES AND SEMEN POURS INTO FEMALE'S MOUTH, FEMALE PERFORMS ORAL SODOMY ON BLACK PENIS AND LICKS SEMEN OFF; FRAMES 567-569 ORGY CONTINUES AND THEN VICTIM IS CARRIED OFF STAGE; FRAMES 570-576 STORY RETURNS TO TWO MEN AT DINER RECOUNTING STORY; FRAMES 577-599 CLOSEUP OF FEMALE PERFORMING FELLATIO; FRAME 600 CUNNILINGUS.

Behind the Green Door
(Part 13 of 14 Parts)

Exhibited at the Mitchell Brothers' Santa Ana Theater from 9/3/75 thru 1/15/76. See Petition at fn. 2 on p 5

FRAMES 601-611 CLOSEUP OF MALE PERFORMING CUNNILINGUS ON VAGINA; FRAMES 612-650 FEMALE MOUNTS MALE IN SEXUAL INTERCOURSE, CLOSEUP OF PENETRATION. MALE THEN MOUNTS FEMALE IN SEXUAL INTERCOURSE.

Behind the Green Door
(Part 14 of 14 Parts)

Exhibited at the Mitchell Brothers' Santa Ana Theater from 9/3/75 thru 1/15/76. See Petition at fn. 2 on p 5

FRAMES 651-672 MALE AND FEMALE IN SEXUAL INTERCOURSE TO END--MALE SUPERIOR.

APPENDIX J

(Reference: Petition at pg. 37.)

Defendants' Post Judgment Memorandum of Costs and Disbursements.

.....J-1 Thru J-8

Law and Motions Judge Cardenas Post Judgment Minute Order ruling on Plaintiff's Motion To Tax Costs.

.....J-9

MEREDITH BRADFORD,
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San Francisco, California
94109
Telephone: (415) 474-0140

FILED
JUN 1-1981
LEE A. BRANCH,
County Clerk
By_____
Deputy

Attorney for Defendants

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ORANGE

PEOPLE OF THE STATE OF CALIFORNIA, ex rel. Keith Gow, City Attorney of the City of Santa Ana, California,

Plaintiff,

vs.

MITCHELL BROTHERS' SANTA THEATER, located at 1565 West 17th Street, Santa Ana, California, County of Orange, California; M.B.F.G. THEATER CIRCUIT, INC.; JIM GISH; ALLISON HONER CO., a Partnership; UNITED ARTISTS THEATER CIRCUIT, INC.; CONTINENTAL AUXILIARY COMPANY, a California Corporation; BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, a National Banking Association; JAMES MITCHELL; ARTIE MITCHELL; DEMICH, INC., a California Corporation; MITCHELL BROTHERS' FILM GROUP, a General Partnership; CINEMA 7, INC., a California Corporation; DOES I through C, inclusive,

Case No.
25-65-30

[Court of Appeal No. 19440]

MEMORANDUM OF COSTS AND DISBURSEMENTS

Defendants.

Defendants submit the following statement of costs and disbursements:

1. Clerk's Fees:

Filing	$ 50.00	
Copy-Order	5.00	
Filing	25.00	
Motion	3.00	
Filing	$ 7.00	
TOTAL:	$ 90.00	$ 90.00

2. Service of Process:

	$ 59.25	
	$ 38.50	
TOTAL:	$ 97.75	$ 97.75

3. Reporter's Fees:

Transcript	$144.00	
Deposition - Babish	83.60	
Deposition - J. Mitchell	88.00	
Deposition - J. Mitchell	197.42	
Deposition - J. Mitchell	83.45	
Deposition - J. Mitchell	36.45	
Deposition - J. Mitchell	67.05	
Deposition - A. Mitchell and James Clancy	211.85	
Transcript	150.00	
Transcript	275.61	
Transcript	150.00	
Transcript	253.80	
Transcript	214.40	
Transcript	273.85	
Transcript	59.82	
Transctipt	89.55	
Transcript	17.25	
Transcript	$ 15.00	
TOTAL:	$2411.10	$2411.10

4. Jury Fees:

Daily at $60.00	$1560.00	
Transportation/ Miscellaneous	230.00	
Food	9.22	
Food	60.00	
Food	70.00	
Food	3.21	
Food	3.91	
Food	$ 4.20	
TOTAL:	$1940.54	$1940.54

5. Witness Fees:

Rubenstein	$ 164.00	
McIlvena	594.00	
J. Mitchell	136.00	
A. Mitchell	$ 112.00	
TOTAL:	$1006.00	$1006.00

6. Exhibits:

Rental Fee: Films	$16,200.00	
TOTAL:	$16,200.00	$16,200.00

8. Costs Awarded on Appeal:

Filing Fees	$ 200.00	
Record on Appeal	7077.45	
Brief's Printing	$ 60.00	
TOTAL:	$7337.45	$ 7337.45

GRANT TOTAL: $29,082.84

DECLARATION OF MEREDITH BRADFORD

STATE OF CALIFORNIA)
)
COUNTY OF SAN FRANCISCO)

I, MEREDITH BRADFORD, state:

I am the Attorney for Defendants in the above-entitled action. To the best of my knowledge and belief the foregoing items of costs and disbursements in this action are correct and the said disbursements have been necessarily incurred in said action.

I declare under the penalty of perjury that the foregoing is true and correct and that this declaration was executed on May 29. 1981 at San Francisco, California.

/s/
MEREDITH BRADFORD,
Attorney for Defendants

MEMORANDUM OF POINTS AND AUTHORITIES

A modification directed by the appellate court resulting in casting judgment to the other side sets the costs awarded in the lower court at large. Purdy vs. Johnson (1929) 100 CA 416. A Memorandum of Costs should be filed in the office of the clerk of the court below at the time of filing the remittitur there, or within the time specified by the statute thereafter. Ex parte Burrill ( ) 24 C 350. Code Commissioner's note C.C.P. §1033. Code of Civil Procedure Section 1033 specifies ten (10) days after entry as the time within which to file the Memorandum of Costs. Remittitur herein was issued by The Court of Appeal, Fourth District Division Two on May 18, 1981 and filed in the Superior Court of the County of Orange on May 20, 1981, and this memorandum is therefore timely filed

pursuant to C.C.P. §1033.

The decision of the Court of Appeal herein filed January 20, 1981, hearing denied by California Supreme Court on May 13, 1981, left intact a permanent injunction against Defendant enjoining the showing of eleven (11) films, but reversed a damage award against Defendant in the amount of SEVENTY SIX THOUSAND DOLLARS ($76,000.00), reversed the imposition of a trust against Defendant in the amount of ONE HUNDRED THOUSAND DOLLARS ($100,000.00) as well as reversing other equitable remedies originally awarded Plaintiff against Defendant. The result "casting judgment to the other side sets the costs awarded in the lower court at large," Purdy vs. Johnson, supra, because clearly, a favorable judgment is prerequisite to an award of costs. Gutting vs. Globe Indemnity Company (1931) 119 CA 288. The costs in the amount of FIVE THOUSAND EIGHT

HUNDRED SIXTY NINE DOLLARS AND THIRTY ONE CENTS ($5,869.31) originally awarded Plaintiff in the judgment after trial are thus of no effect, as Plaintiff is no longer the prevailing party in its cause of action for money or damages.

The Code of Civil Procedure Section 1032(b) provides that the defendant upon a judgment in his favor in an action for the recovery of money or damages is entitled to costs as a matter "of course," that is, as a matter of right, Schmidt vs. Klotz (1900) 130 C 223, whereas in suits in equity the award of costs is in the court's discretion. Neider vs. Dardi (1957) 152 CA2d 156.

Defendants are thus entitled to the costs incurred at trial of this matter as enumerated in the attached Memorandum of costs.

Defendants are further entitled to costs on appeal as expressly provided for

by the remittitur filed in this court on May 20, 1931.

Dated: May 28, 1981

Respectfully submitted,

MEREDITH BRADFORD
Attorney for Defendants

SUPERIOR COURT OF CALIFORNIA,

COUNTY OF ORANGE

JUDGE LUIS A. CARDENAS DATE July 20, 1981

CLERK M. Turner/T. Hoyle DEPARTMENT 22

TITLE PEOPLE OF THE STATE OF CALIF. VS MITCHELL BROTHERS SANTA ANA THEATER

ATTORNEY(S) No appearances

RULING ON SUBMITTED MATTER

The Court, having taken this matter under submission, now rules as follows:

(1) $16,200.00 costs of trial submitted by defendants are taxed in total.

(2) $7,077.26 costs of appeal by defendants are not taxed.

(3) $5,869.31 award of costs to plaintiffs for trial costs by the trial judge is vacated. Mr. Clancy to give notice.

LAW AND MOTION

MINUTE ORDER

APPENDIX K

(Reference: Petition at pg. 48, 52.)

Opinion of the Idaho Supreme Court in State of Idaho ex rel. Kidwell et al. v. U.S. Marketing, Inc., and Niks and Naks Adult Bookstore, et al., filed May 29, 1981.

.....K-1 Thru K-34

1981 Opinion No. 67

IN THE SUPREME COURT OF THE STATE OF IDAHO
Nos. 12867 & 12910

STATE OF IDAHO, ex rel. WAYNE L. KIDWELL, ATTORNEY GENERAL; and DAVID H. LEROY, ADA COUNTY PROSECUTING ATTORNEY, Plaintiff-appellants, Cross respondents, v. U.S. Marketing, Inc., an Idaho corporation, 4094 Chinden Blvd., County of Ada, State of Idaho, Lot 34, Block 6, Fairview Acres Subdivision #1; LAMAR LARSEN, Manager and Property Incorporator, JEAN LARSEN, Manager; DON COSSETTE; TOM SHAW, Owner and Incorporator; DAVID BURTON, Clerk; JERRY VAN CAMP, JOHN M. SOUTHWORTH, Individually, and as Contract Property Owners; JOHN DOE #1, Arcade Machine Owners or Lessors; JOHN DOE #2, Security Interest Holder; JOHN DOES #3-10, Defendant-Respondents, Cross appellants, and NIKS & NAKS ADULT BOOKSTORE, a business, 3988 Chinden Blvd., Garden City, County of Ada, State of Idaho, Lot 34, Block 7, Fairview Acres Subdivision #1; ROBERT S. LOYA, Owner;	Boise term, February 1981 Filed: May 19, 1981 R.H. Young, Clerk

JOSEPH E. OSCO, BETTY OSCO, Owner, Managers; MELVIN WINN, Clerk: CECIL ANDREW JOHNSON, JR., and HELEN M. HANSON, Property owners; JOHN DOE #1, Arcade Machine Owners or Lessors; JOHN DOE #2, Security Interest Holder; JOHN DOES #3-10,

Defendant-respondents, Cross appellants.

STATE OF IDAHO, ex rel. Wayne L. KIDWELL, ATTORNEY GENERAL; and DAVID H. LEROY, ADA COUNTY PROSECUTING ATTORNEY,

Plaintiff-respondents, Cross appellants,

v.

U.S. MARKETING, INC., an Idaho corporation, 4094 Chinden Blvd., County of Ada, State of Idaho, Lot 34, Block 6, Fairview Acres Subdivision #1, County of Ada, State of Idaho; LAMAR LARSEN, Manager and Property Incorporator; JEAN LARSEN, Manager; DAN COSSETTE; TOM SHAW, Owner and Incorporator; DAVID BURTON, Clerk,

Defendant-appellants, Cross respondents,

and

JERRY VAN CAMP, JOHN M. SOUTHWORTH, Individually, and

as Contract Property Owners; JOHN DOE #1, Arcade Machine Owners or Lessors; JOHN DOE #2, Security Interest Holder; JOHN DOES #3-10,

Defendants,

and

NIKS AND NAKS ADULT BOOKSTORE, a business, 3988 Chinden Blvd., Garden City, County of Ada, State of Idaho, Lot 34, Block 7, Fairview Acres subdivision #1; ROBERT S. LOYA, Owner; JOSEPH E. OSCO and BETTY OSCO, Owner-managers; MELVIN WINN, Clerk,

Defendants-appellants, Cross respondents,

and

CECIL ANDREW JOHNSON, JR., and HELEN M. HANSON, Property Owners; JOHN DOE #1, Arcade Machine Owners or Lessors; JOHN DOE #2, Security Interest Holder; JOHN DOES #3-10,

Defendants.

Consolidated appeals from the District Court of the Fourth Judicial District of the State of Idaho, Ada

County. Hon. W.E. Smith, District Judge.

Appeal by state from district court order declaring statutory nuisance provision unconstitutional; appeal by all parties from district court's award of costs and attorney fees. Reversed.

David H. Leroy, Attorney General, and Timothy M. Walton, Deputy Attorney General, Boise, Idaho, for the State of Idaho.

David W. Cantrill, of Cantrill & Green, Boise, Idaho, for Niks and Naks Adult Bookstore, et al.; and William J. Tway, of Tway & Tway, Boise, Idaho, for U.S. Marketing, Inc., et al.

BAKES, C.J.

The state commenced this action against two Garden City adult bookstores under the provisions of the Idaho Moral Nuisance Abatement Act. I.C. §§52-401, et seq. Named as defendants were two business entities, U.S. Marketing, Inc., and Niks & Naks Adult Bookstore; their managers, owners, officers and incorpora-

tors; and those individuals who owned the two parcels of property upon which the bookstores were located.

The state sought to have some of defendants' films and publications declared obscene. The state asked for injunctive relief abating the alleged nuisance; a one-year forfeiture of the use of the real property in question; and an award of the costs of abatement including, but not limited to, investigative costs, court costs and attorney fees. The state also requested other relief not relevant on appeal.

Responding to a motion to dismiss, the trial judge disposed of several threshold constitutional issues. The judge held that nuisance abatement proceedings are a proper and constitutional method of attempting to control the sale and distribution of obscene

materials. He concluded that the defendants could be enjoined from further sale and distribution of those materials adjudicated to be obscene. However, the judge held that those statutory provisions which permit any forfeiture or closure of the physical premises and real property, see I.C. §§52-406 and -412, constitute an unlawful "prior restraint" on free speech and a violation of due process.

The owners of the two parcels of property in question were then dismissed from the lawsuit. Two of those individuals, defendant respondents Cecil Johnson and Helen Hanson, lease their property to Niks & Naks. Johnson and Hanson were dismissed presumably because the remedies available against the real property were held to be unconstitutional. After granting the motion to dismiss, the trial judge awarded costs and attorney

fees to Johnson and Hanson. The state objected to the award below and raises that issue again on appeal.

A trial on the merits was held before the district judge, who found that the majority of the exhibits introduced by the state were obscene. The court entered judgment accordingly and enjoined the remaining defendants from further sale and/or exhibition of any of the materials found obscene.

The state then attempted to collect the "costs of abatement" pursuant to I.C. §52-415. The trial court awarded the state only a limited amount for attorney fees, stating, among other things, that the state's attorneys did not keep adequate hourly time records.

The state appeals, contending (1) that the one-year forfeiture or closure order sought by the state is <u>not</u> an

unconstitutional prior restraint upon free speech; (2) that the trial court's reduced award for abatement costs against the remaining defendants was in error; and (3) that it was error for the court to grant costs and attorney fees to dismissed defendants Hanson and Johnson. The trial defendants cross-appealed, alleging that the state was not entitled to any abatement costs.

I

Before turning to the merits, it is essential that we articulate the limited context in which defendants' first amendment claim comes to this Court. The sole constitutional question presented in this appeal is whether a district court may impose a one-year forfeiture of the use of real property upon a finding, made pursuant to constitutionally acceptable procedures, that obscene materials were

disseminated on the property. Defendant respondents contend that such a closure order or forfeiture constitutes an unlawful prior restraint upon the exercise of free speech insofar as it affects materials not determined to be obscene. We disagree for reasons set forth later in this opinion.

The defendants do not, however, contest the lower court's finding of obscenity. Nor do they contest the standards which the lower court applied in making that determination. See Miller v. California, 413 U.S. 15 (1973). The fact of obscenity is therefore not an issue in this appeal.

More importantly, this appeal involves no procedural issues. The United States Supreme Court has imposed a number of procedural requirements upon the states' efforts to regulate dissemination

of sexually oriented materials.[1] See Vance v. Universal Amusement Co., Inc., 445 U.S. 308 (1980); Southeastern Promotions, Ltd., v. Conrad, 420 U.S. 546 (1975); Freedman v. Maryland, 380 U.S. 51 (1965); Kingsley Books, Inc. v. Brown, 354 U.S. 436 (1957). Idaho's moral nuisance statutes, I.C. §§52-401 et seq., contain a relatively extensive and rather complex procedural blueprint for nuisance actions of this type. For purposes of this appeal, we need only observe that the nuisance statutes do not provide for or allow any restraint upon dissemination

[1] According to the Court, there are three fundamental procedural requirements which must be met prior to the imposition of any restrain upon the dissemination of obscenity. "First, the burden of institutin judicial proceedings, and of proving that the material is unprotected, must rest on the censor. Second, any restraint prior to judicial review can be imposed only for a specified brief period and only for the purpose of preserving the status quo. Third, a prompt final judicial determination must be assured." Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 560 (1975). See L. Tribe, American Constitutional Law §12-36, at 734-36 (1978). The appellants have not alleged that any of the above requirements were not met.

prior to a judicial determination of obscenity. See State ex rel. Ewing v. "Without a Stitch," 307 N.E.2d 911, 914 (Ohio 1974), dismissed for want of substantial federal question sub nom. Art Theatre Guild, Inc. v. Ewing, 421 U.S. 923 (1975).

We stress the limited scope of this appeal because the United States Court of Appeals for the Ninth Circuit has recently struck down, on procedural grounds, certain Washington moral nuisance statutes identical to Idaho's. Spokane Arcades, Inc. v. Brockett, 631 F.2d 135 (9th Cir. 1980). The Ninth Circuit did not reach the issue presented by the instant appeal,[2] nor has, to our knowledge, any

[2] "The ability of a court to close a place temporarily because obscene materials may have been sold, distributed, or exhibited on the premises is an impermissible prior restraint. We express no opinion with respect to what circumstances, if any, would justify a closure subsequent to a determination that conforms in all respects to the First Amendment." Spokane Arcades, Inc. v. Brockett, 631 F.2d at 139.

United States Supreme Court case.[3] By the same token, we do not reach those procedural issues resolved in Spokane Arcades.

II

In the last few decades, the Supreme Court of the United States has often

[3] In its most recent obscenity case, Vance v. Universal Amusement Co., Inc., 455 U.S. 308 (1980), the Supreme Court came close to, but did not decide, the issue presented by this appeal. In Vance, the Court examined the constitutionality of certain Texas nuisance abatement statutes. Although the Texas statutes did contain a one-year closure provision, the Fifth Circuit Court of Appeals construed that provision to apply only to certain common nuisances such as gambling and prostitution. On appeal, the Supreme Court accepted the Fifth Circuit's construction. It was therefore unnecessary for the Court to determine whether a one-year closure order could be imposed in an obscenity nuisance action.

Although the Supreme Court has never expressly confronted this issue, it may nonetheless have implicitly approved of one-year closure orders in obscenity cases. See State ex rel. Ewing v. "Without a Stitch," 307 N.E.2d 911 (Ohio 1974), dismissed for want of substantial federal question sub nom. Art Guild Theatre, Inc. v. Ewing, 421 U.S. 923 (1975). The significance of that decision will be discussed later in the opinion.

[4] Our citation to the Spokane Arcades case should by no means be equated with approval. Indeed, it appears that the Spokane Arcades panel made little effort to construe Washington's

spoken to the issue of obscenity and the first amendment. Several fundamental principles have emerged. First, and perhaps foremost, obscenity is not protected by the first amendment. E.g., Paris Adult Theater I v. Slayton, 413 U.S. 49 (1973); Miller v. California, 413 U.S.

statute in a constitutional manner. For example, in holding that the Washington nuisance abatement statutes were procedurally deficient, the panel listed four supposed defects, without once considering any alternative constitutional constructions. A statute must be construed in a constitutional sense where reasonable and practicable to do so. U.S. Civil Service Commission v. Natl. Ass'n of Letter Carriers, 413 U.S. 548 (1973); United State v. Vuitch, 402 U.S. 62 (1971); State v. Rawson, 100 Idaho 308, 597 P.2d 31 (1979). It seems clear that some, if not all, of the purported procedural defects identified in Spokane Arcades may be cured by appropriate construction. See United States v. 37 Photographs, 402 U.S. 363 (1971); Grove Press, Inc. v. Flask, 326 F.Supp. 574 (N.D.Ohio 1970), vacated 413 U.S. 902 (1973); General Corp. v. State ex rel. Sweeton, 320 So.2d 668(Ala. 1975), cert. denied 524 U.S. 904 (1976); State ex rel. Ewing v. "Without a Stitch," 307 N.E.2d 911 (Ohio 1974), dismissed for want of a substantial federal question sub nom. Art Guild Theatre, Inc. v. Ewing, 421 U.S. 923 (1975). In fact, the record in this case reflects that the district court avoided some procedural problems by imposing appropriate savings constructions upon the Idaho nuisance statutes. Therefore, the Spokane Arcades decision may not be entitled to great precedential value.

15 (1973). Hence, the states have considerable leeway in attempting to regulate the dissemination of sexually explicit materials which are obscene.

> "We need not linger over the suggestion that something can be drawn out of the Due Process Clause of the Fourteenth Amendment that restricts New York to the criminal process in seeking to protect its people against the dissemination of pornography. It is not for this Court thus to limit the State in resorting to various weapons in the armory of the law. Whether proscribed conduct is to be visited by a criminal prosecution or by a qui tam action or by an injunction or by some or all of these remedies in combination, is a matter within the legislature's range of choise." Kingsley Books v. Brown, 354 U.S. at 441.

It is also clear that the states have the power to punish purveyors of illegal pornography. Roth v. United States, 354 U.S. 476 (1957); Smith v. People, 361 U.S.

147 (1959).[5] However, while punishment after the fact is permissible, courts have exhibited a marked dislike for restraining even unprotected obscenity prior to its dissemination. "Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity."[6] Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963). See Vance v. Universal Amusement Co., Inc., supra. Prior restraints upon

[5] In Smith, the Supreme Court required some form of scienter as an element of proof in a criminal obscenity prosecution. Other courts have construed the Smith ruling to require proof of scienter in civil obscenity actions of a punitive nature. Grove Press, Inc. v. Flask, supra; State ex rel. Ewing v. "Without a Stitch," supra. That issue was not raised on this appeal, and thus we do not decide it.

[6] "Behind the distinction is a theory deeply etched in our law: a free society prefers to punish the few who abuse rights of speech after they break the law than to throttle them and all others beforehand. It is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of freewheeling censorship are formidable." Southeastern Promotions, Ltd. v. Conrad, 420 U.S. at 558-59.

expression are not absolutely prohibited, however, and, as long as certain procedural safeguards are employed, obscene expression may be enjoined. Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975); Freedman v. Maryland, 380 U.S. 51 (1965); Kingsley Books v. Brown. See note 1, supra.

While much has been written on procedural requirements in cases involving "prior restraint," very little has been written to define the phrase. To merely label something unconstitutional as a prior restraint is question begging at its best, especially if no analytical effort is made to determine whether the regulation is indeed a prior restraint on free speech.

> "The phrase 'prior restraint' is not a selfwielding sword. Nor can it serve as a talismanic test. The duty of closer analysis and critical judgment in applying the thought behind the phrase has thus been authoritatively put by one who

> brings weighty learning to his support of constitutionally protected liberties: 'What is needed,' writes Professor Paul A. Freund, 'is a pragmatic assessment of its operation in the particular circumstances. The generalization that prior restraint is particularly obnoxious in civil liberties cases must yield to more particularistic analysis.' The Supreme Court and Civil Liberties, 4 Vand.L.Rev. 533, 539." Kingsley Books v. Brown, 354 U.S. at 441-42.

By way of example, if a bookseller, having fallen behind on his property taxes, loses his bookstore at a tax sale, he will not be heard to complain that the state has imposed an unlawful prior restraint upon his bookselling activities. If that same bookseller is convicted of the crime of distributing obscene materials, he may be imprisoned, and yet he will not be heard to complain that his incarceration constitutes a prior restraint upon his ability to disseminate protected speech, even though it is quite

clear that it has that effect.[7]

At the other end of the spectrum is the type of direct restraint found in the always-cited landmark case of Near v. Minnesota, 283 U.S. 697 (1931). The State of Minnesota had commenced a statutory nuisance abatement action against Near and his newspaper, alleging it to be "malicious, scandalous and defamatory." After a trial, the district court found that the defendants did regularly publish

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[7] In upholding a similar one-year closure provision, a Michigan court remarked,

> "Persons convicted of violating this state's criminal obscenity law ... are subject to imprisonment for a period of time not to exceed one year. No one could seriously argue that the statute, insofar as it provides for imprisonment, constitutes a prior restraint on a person's first amendment rights simply because during the period of incarceration that person could not show movies he otherwise might have. We can see no difference here, particularly in light of the fact that a sanction less severe than a deprivation of personal liberty is involved.' State ex rel. Cahalan v. Diversified Theatrical Corp., 229 N.W.2d 389, 396 (Mich.App. 1975) (citations omitted), rev'd on other grounds, 240 N.W.2d 460 (Mich. 1976).

a malicious, scandalous and defamatory newspaper, and that such newspaper was therefore subject to abatement as a nuisance. The court also perpetually enjoined the defendants "from producing, editing, publishing, circulating, having in their possession, selling or giving away any publication whatsoever which is a malicious, scandalous or defamatory newspaper, as defined by law." Id. at 706. The Supreme Court held, of course, that such an injunction constituted an inpermissible prior restraint. The Court placed much emphasis on the fact that the object of the Minnesota statute was to suppress the offending newspaper and to censor the offending publisher.

There are a number of distinctions between the Near case and the previously cited hypothetical examples, not the least of which is the fact that Near dealt with speech critical of public officials rather

than speech of a sexual nature. Most significantly, however, the Near injunction against prospective publication was based on the content of such publication. In the case of tax sales and imprisonment for violation of criminal obscenity statutes, the incidental restraint on future expression is not based on the content of that expression.[8]

> "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter or its content. ... The essence of this forbidden censorship is content control. Any restriction on expressive activity because of its content would completely undercut the 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide

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[8] The typical prior restraint case deals with the government's effort to censor future expression based on its content. See, e.g., Nebraska Press Ass'n v. Stewart, 427 U.S. 539 (1976); Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975); New York Times Co. v. United States, 403 U.S. 713 (1971); Organization For a Better Austin v. Keefe, 402 U.S. 415 (1971); Freedman v. Maryland, 380 U.S. 51 (1965); Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963).

> open.'" Police Dept. of Chicago v. Mosley, 408 U.S. 92, 95-96 (1972), quoting New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964). (Emphasis added, citations omitted.)

The one-year forfeiture provision of the Idaho moral nuisance statute avoids the particularly noxious specter of content control. Like a tax sale, the forfeiture is directed strictly at property, apart from the content of any expression contained therein. And like imprisonment for a criminal obscenity transgression, the forfeiture is intended to penalize past distributions of illegal and unprotected obscenity. The legislature could just as easily have imposed a fine or other property-related penalty. Instead, the legislature chose to punish the violator by temporarily depriving him of the property which was used in committing the violation.

The state's authority to impose property related sanctions in civil

actions is well established. In modern times, the most prevalent example of this type of in rem action can be found in statutes imposing forfeitures upon vehicles and vessels used to transport contraband drugs. E.g., 21 U.S.C. §881(a); 49 U.S.C. §§781, 782; I.C. §37-2744. See Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974). Forfeiture is not limited to property used in drug crimes, however. "[C]ontemporary federal and state forfeiture statutes reach virtually any type of property that might be used in the conduct of a criminal enterprise." Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. at 683. See State v. 36 Pinball Machines, 565 P.2d 236 (Kans. 1977). In Calreo-Toledo, the Supreme Court of the United States upheld a long line of prior decisions which held that forfeiture statutes, although admittedly harsh, do not impose an

unconstitutional taking of property without just compensation, even though the property itself is capable of innocent use, and even though the forfeiture may enmesh the property interests of innocent owners, lessors, lenders, bailors or secured creditors. The government's authority to impose a forfeiture extends even to real property. See United States v. Stowell, 133 U.S. 1 (1890); Dobbin's Distillery v. United States, 96 U.S. 395 (1878); 26 U.S.C. §5615(3) (imposing forfeiture of real property upon which unlawful distillery is operated).

The purpose of statutory forfeitures is obvious: to punish and to deter. As the Calero-Toledo Court observed, statutory forfeitures punish "by imposing an economic penalty, thereby rendering illegal behavior unprofitable." Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. at 687. That is the manifest purpose

of Idaho's one-year closing provision; not to prevent future expression, but to punish past illegal conduct by depriving the violator of economic gain. That is a permissible state objective, implemented by permissible means.

The state's position in this case is further buttressed by reference to two other Supreme Court cases. The first is Art Theater Guild, Inc. v. Ewing, 421 U.S. 923 (1975), which dismissed an appeal from State ex rel. Ewing v. "Without a Stitch," 307 N.E.2d 911 (Ohio 1974), for want of a substantial federal question. The Ohio Supreme Court had ruled that a one-year closure provision much like Idaho's was a constitutionally permissible method of controlling obscenity. The Supreme Court's subsequent dismissal is significant. As the case of Hicks v. Miranda, 422 U.S. 332 (1975), makes clear, a dismissal for want of substantial federal

question must be considered a ruling on the merits by the United States Supreme Court. Thus, the high Court has placed its implicit imprimatur on a nuisance clause provision virtually identical to Idaho's, thereby refuting defendants' contention that imposition of any closure order constitutes an unlawful prior restraint.

The second case is Young v. American Mini Theatres, 427 U.S. 50 (1976). In Young, the Court held that local governments may regulate obscenity by zoning laws. The Court specifically held that a zoning ordinance which imposed a licensing requirement upon adult motion picture theaters did not constitute an impermissible prior restraint upon free speech. The Court remarked:

> "The ordinances are not challenged on the grounds that they impose a limit on the total number of adult theaters which may operate in the city of Detroit. There is no claim that

> distributors or exhibitors of adult films are denied access to the market or, conversely, that the viewing public is unable to satisfy its appetite for sexually explicit fare. Viewed as an entity, the market for this commodity is essentially unrestrained." Id. at 62 (emphasis added).

The Court's reasoning applies to the instant case. The defendants are not denied access to the market, nor are they absolutely restrained from selling any sexually explicit materials other than those specifically adjudicated to be obscene. The closure order imposes as a sanction only a temporary forfeiture on a specific piece of property found to be directly related to past violations of obscenity law. Like the theater owners in Young, the defendants in this case are free to conduct their business elsewhere.[9]

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[9] Other courts have relied upon this fact in upholding similar closure provisions.

> "Defendants' arguments in this regard fail to recognize ... that the sanctions of the statute are imposed, after a full hearing in court, because of past exhibitions and not

We therefore conclude that, under the circumstances of this case, a one-year closure or forfeiture order does not by itself constitute an unlawful prior restraint upon the exercise of free

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because of past exhibitions and not because of what may or may not be shown in the future. Indeed, the sanctions imposed by the statute do not restrict the right of defendants herein to legally exhibit films not yet declared obscene. The sanctions simply prohibit the defendants from doing so in these particular buildings. The statute simply imposes a sanction for past acts and affects the right of the owners and operators to exhibit future films only insofar as it precluded them from doing so in these buildings." State ex rel. Cahalan v. Diversified Theatrical Corp., 229 N.W.2d at 396.

"[W]hile appellants are arguably denied their right of First Amendment expression to some extent, they are denied such right only upon the specific property here involved and only for a limited period of time. They are in the meantime free to exercise their First Amendment rights at any other place." People ex rel. Hicks v. "Sarong Gals," 117 Cal.Rptr. 24, 28 (Cal.App. 1974). See also People ex rel. Sorenson v. Randolph, 160 Cal.Rptr. 69 (Cal.App. 1979).

speech.[10] Our conclusion is based on the following: the extensive power of the state to impose a forfeiture on neutral and innocent property used in the commission of forbidden acts; the power of the state to impose sanctions of its choice upon those who disseminate unprotected obscenity; the fact that the forfeiture or closure order is not directed at any speech or publication, but is instead aimed at the real property apart from the content of expression contained therein; and the fact that the defendants remain free to disseminate any materials, except those already determined

[10] We come to this conclusion fully aware that a number of states have held that closure provisions constitute improper prior restraints. General Corp. v. State ex rel. Sweeton, 320 So.2d 668 (Ala. 1975), cert. denied 425 U.S. 904 (1976); People ex rel. Busch v. Projection Room Theatre, 550 P.2d 600 (Cal. 1976), cert. denied 429 U.S. 922 (1976); Sanders v. State, 203 S.E.2d 153 (Ga. 1974); State v. A Motion Picture Entitled "The Bet," 547 P.2d 760 (Kans. 1976); Gulf States Theatres of Louisiana, Inc. v. Richardson, 287 So.2d 480 (La. 1973); State ex rel. Andrews v. Chateau X, Inc., 250 S.E.2d 603 (N.C. 1979), vacated 445 U.S. 947 (1980).

to be obscene, at any other location, subject of course to further penal actions by the state should the defendants again violate laws regulating obscenity. Again, our conclusion is premised on the fact that, as shown by the record below, the one-year closure would be imposed only after a judicial determination of obscenity made pursuant to constitutionally acceptable procedures.

III

The remaining issues relate to attorney fees and abatement costs. Defendants Hanson and Johnson, owners and lessors of the Niks & Naks property, were awarded attorney fees as prevailing parties after they were dismissed from the case due to the lower court's ruling on the constitutional issue. Today's opinion reverses that ruling, and thus at this point Hanson and Johnson are no longer prevailing parties. Therefore, that award

is set aside. Any award of attorney fees to either party must await the final outcome of this case on remand.

The state also contends that the trial court's award of attorney fees and abatement costs pursuant to I.C. §52-415 was insufficient. We agree for several reasons.

Firstly, although several other moral nuisance provisions may be penal in nature, the provision relating to recovery of abatement costs, I.C. §52-415, is clearly remedial. As such, it should be liberally construed with a view to effect its manifest objectives. E.g., Doggett v. Electronics Corp. of America, 93 Idaho 26, 454 P.2d 63 (1969). See I.C. §73-102.

Secondly, the court below denied the state virtually all of its request for attorney fees on the grounds that it did not keep hourly time records. The introduction of hourly time sheets into

evidence is not a prerequisite to an award of reasonable attorney fees. See Realty West, Inc. v. Thomas, 95 Idaho 262, 506 P.2d 830 (1973); Dykstra v. Dykstra, 94 Idaho 797, 498 P.2d 1270 (1972). Cf. I.R.C.P. 54(e)(3) (amount of time spent is but one of several factors to be considered in awarding attorney fees). I.C. §52-415 contains a clear legislative directive that obscene materials are to be abated. Upon entry of judgment against defendants in legal proceedings brought pursuant to the moral nuisance statutes, not only are the gross profits ("the fruits of [the] unlawful enterprise") to be forfeited, but also the full costs of abatement, including but not limited to investigative costs, court costs, reasonable attorney fees, and costs on appeal, are to be charged to the defendants against whom a judgment is entered. The trial court's nominal award

of attorney fees, and denial of other abatement costs including investigative costs, printing costs, and the like, is not in keeping with the legislative policy set out in I.C. §52-415.

The trial defendants argue that the state should not be awarded any attorney fees. They maintain that the state accrued no fees, inasmuch as it was represented by staff attorneys. That argument has been previously rejected by this court. James v. Dunlap (In re Dunmire), 100 Idaho 697, 604 P.2d 711 (1979). See Futrell v. Martin, 100 Idaho 473, 600 P.2d 777 (1979).

The trial defendants also contend that I.C. §52-415 violates the equal protection clause because it awards abatement costs only to a prevailing plaintiff. A statute providing an award of attorney fees only to the prevailing plaintiff does not violate equal

protection principles where, as here, the award furthers a legitimate governmental objective. See Christiansburg Garment Co. v. E.E.O.C., 434 U.S. 412 (1978); Harrington v. McCarthy, 91 Idaho 307, 420 P.2d 790 (1966); Hindman v. Oregon Short Line RR. Co., 32 Idaho 133, 178 P. 837 (1918). See generally, Annot., 73 A.L.R.3d 515 (1976).

The judgment of the district court is therefore reversed and remanded for further proceedings consistent with this opinion. Costs on appeal are awarded to plaintiff State of Idaho against all defendants. Attorney fees on appeal are awarded pursuant to I.C. §52-415 to the State of Idaho against all defendant appellants.

McFADDEN, BISTLINE AND DONALDSON, JJ., concur.

SHEPARD, J., concurring in part and dissenting in part.

I concur with the majority opinion except that portion whereof in which the trial court's award of attorney's fees and abatement costs is ruled insufficient and reversed presumably for the award of additional attorney's fees and abatement costs. As indicated by the majority opinion, a portion of the trial court's ruling appears to be that the State prevailed only as to a portion of its entire case. Hence, I would believe that I.R.C.P. 54(e)(1) as it relates to a trial court's determination of the "prevailing party" in accordance with I.R.C.P. 54(d)(1) constitutes sufficient authority upon which to uphold the trial court's ruling.

APPENDIX L

(Reference: Petition at pg. 36, fn. 14.)

Minute Order of Orange County Superior Court Judge Claude M. Owens, filed July 31, 1981, in second and third public nuisance abatement lawsuits (No. 28-12-14 and 29-91-83.)

.....L-1

Memorandum of Intended Decision of Orange County Superior Court Judge Claude M. Owens in second and third public nuisance abatement lawsuits (No. 28-12-14 and 29-91-83) filed on July 31, 1981.

.....L-2 Thru L-8

IN THE SUPERIOR COURT OF THE

STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF ORANGE

Dept. 17

Court convened at July 31, 1981, present

Hon. CLAUDE M. OWENS, Assigned, Judge;

Janet Lee, Deputy Clerk;

and the following proceedings were had:

29-91-83
28-12-14 PEOPLE OF THE STATE OF CALIFORNIA EX REL KEITH GOW, CITY ATTORNEY OF THE CITY OF SANTA ANA, CALIFORNIA VS MITCHELL BROTHERS' SANTA ANA THEATER, ET AL

This matter having been taken under submission on July 1, 1981, the Court rules as per the Memorandum of Intended Decision dated July 31, 1981. Counsel mailed copy of same and copy of this minute order. ENTERED 7-31-81.

MINUTE ORDER

MEMORANDUM OF INTENDED DECISION

The People of the State of California ex rel. Keith Gow, City Attorney of the City of Santa Ana

vs.

Mitchell Brothers' Santa Ana Theater, et al.

Case Nos. 29-91-83
28-12-14

Points and authorities have been received, filed and considered. The Court now rules:

Beyond a reasonable doubt each of the six films is obscene as the word "obscene" is defined in Penal Code Section 311(a) and as interpreted by Bloom vs. Municipal Court, 16 C.3d 71.

Without listing the sordid details of each film, it is sufficient to say that the films are hard-core pornography. Zeitlin vs. Arnebergh, 59 C.2d 901, 920. Obviously the films have been commercially exploited for the sake of their prurient

appeal; no evidence has been offered of any other reason for defendants charging admission to the public to see them.

Defendants' characterization that the explicit sexuality in the films is presented in the context of an appeal to "normal, positive and appreciative sex" is as far from the facts as night is from day.

The definition of obscenity set forth in the complaint is not facially unconstitutional on any of the three grounds defendants list. Bloom vs. Municipal Court, supra, so holds as to the first two: Violation of fair notice and violation of freedom of expression. As to the third ground, violation of right to privacy, language in Bloom, supra, pp. 82-83, is dispositive of the contention.

Because the advertising and public exhibiting of the films constitute a public nuisance, plaintiff is entitled to

an injunction enjoining the defendants and all persons acting by, through, under or in concert with them from advertising or exhibiting those films (People ex rel. Gow vs. Mitchell Brothers' Santa Ana, 114 C.A.3d 923, 931; Busch vs. Projection Room Theater, 17 C.3d 42, 53).

License revocation is denied for these reasons:

1. Resolution 78-131 (Exhibit 10) on which license revocation is based purports to revoke the license because of the showing of certain "lewd" films. None of these films was received in evidence in the case at bar. Therefore, there was no judicial determination of obscenity beyond a reasonable doubt. Without such prior determination, the purported revocation cannot stand.

2. The same resolution applied the wrong standard, i.e. the standard stated in Miller vs. California, 413 U.S. 15,

instead of the standard that controls in California, Penal Code Section 311(a). Notwithstanding language in People ex rel. vs. Camil Buena Vista Cinema, 57 C.A.3d 497, 501 the difference in these standards is a real one; for the Court to, in effect, read out of Section 311 the "utterly without redeeming social importance" requirement..." 'would be to invade the province of the legislature by redefining the elements of the underlying crime' (citation) and would thus violate separation of powers principles." (People vs. Enskat, 33 C.A.3d 900, 910). Because the wrong standard was applied, the city has not made a valid finding of obscenity essential to support a license revocation.

3. Even if the resolution were valid the purported license revocation constitutes a prior restraint on constitutionally protected rights of freedom of expression without compliance with minimum

procedural safeguards.

Those safeguards are: First, the burden of instituting judicial proceedings and of proving that the material is not protected must rest on the censor. Second, any restraint prior to judicial review can be imposed only for a specified brief period and only for the purpose of preserving the status quo. Third, a prompt final judicial determination must be assured. (Southeastern Promotion Ltd. vs. Conrad 420 U.S. 546, 560).

To revoke defendants' license would result in defendants not being able to show any film at the Santa Ana Theater before any judicial determination had been made that the film was obscene. This would appear to violate all three of the above listed safeguards. Such revocation is in substance the same as closing down the theater, action which cannot be done under California law (People ex rel. Busch

vs. Projection Room Theater, 17 C.3d 42, 58).

The Court has carefully considered plaintiff's effort to distinguish Busch by his argument that Busch involved judicial action; that the case at bar involves legislative action which is different from judicial action because of the unique powers, duties and obligations associated with a legislative body such as a city council. Regardless of the difference in these two agencies of government, the basic point remains: The net result of the license revocation is the same infringement of freedom of expression as was involved in Busch. The fact that a different agency of government has caused the infringment in our case than in Busch is immaterial insofar as the violation of the Constitution is concerned.

The Court is aware of footnote 4 in Justice Burke's dissent in Perrine vs.

Municipal Court, 5 C.3d 656, 668 wherein is expressed a philosophy which may prove to be controlling law. But until an upper court rules in accord with that dissent, this Court believes it is bound to follow the Busch rational for the reasons stated.

Counsel for plaintiff will submit judgment for Court signature embodying the foregoing.

Plaintiff is entitled to its costs.

DATED: July 31, 1981.

/s/ Claude M. Owens
Judge of the Superior Court

APPENDIX M

(Reference: Petition at pg. 46.)

Reporter's Transcript of Testimony of City's Investigator, Robert McGuire on June 30, 1981 in trial of second and third public nuisance abatement lawsuits (No. 28-12-14 and 29-91-83) that four (4) of the films surveilled at the Mitchell Brothers' Santa Ana Theater had appeared on "ON" Television in Los Angeles County during the last six (6) months.

.....M-1 Thru M-17

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ORANGE

DEPARTMENT 17

PEOPLE OF THE STATE OF CALIFORNIA EX REL KEITH GOW, CITY ATTORNEY SANTA ANA, PLAINTIFF,	)	
vs.	)	CASE NO. 29-91-83
MITCHELL BROTHERS, ET AL, DEFENDANTS.	)	

HONORABLE CLAUDE M. OWENS, JUDGE PRESIDING

REPORTER'S PARTIAL TRANSCRIPT

JUNE 30, 1981

APPEARANCES OF COUNSEL:

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REPORTER PRO TEMPORE

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SANTA ANA, CALIFORNIA - TUESDAY,

JUNE 30, 1981

MORNING SESSION

(THE FOLLOWING PROCEEDINGS WERE HAD IN OPEN COURT:)

****

THE COURT: YOUR NEXT WITNESS, MR. CLANCY.

MR. CLANCY: MR. MC GUIRE.

ROBERT J. MC GUIRE,

CALLED AS A WITNESS BY AND ON BEHALF OF THE PLAINTIFF, HAVING BEEN FIRST DULY SWORN, WAS EXAMINED AND TESTIFIED AS FOLLOWS:

THE CLERK: STATE YOUR NAME FOR THE RECORD AND SPELL YOUR NAME.

THE WITNESS: ROBERT J. MC GUIRE, M-C,

CAPITAL G-U-I-R-E.

THE CLERK: THANK YOU.

DIRECT EXAMINATION

Q BY MR. CLANCY: MR. MC GUIRE, ARE YOU THE ROBERT MC GUIRE WHO HAS CONDUCTED SURVEILLANCES OF MOTION PICTURES AT MITCHELL BROTHERS' SANTA ANA THEATER FOR THE CITY OF SANTA ANA?

A YES.

Q HAS YOUR SURVEILLANCE SERVICE PERFORMED AT THIS DATE BEEN CONTINUOUS?

A YES.

Q DO YOU MAKE A NEW SURVEILLANCE EACH TIME THE THEATER CHANGES ITS PROGRAM?

A YES.

Q HOW DO YOU DETERMINE WHEN THE PROGRAM HAS BEEN CHANGED AND WHEN YOU NEED TO MAKE A NEW SURVEILLANCE?

A BY CALLING THE THEATER AND GETTING THE THEATER PROGRAM.

Q DURING THE PERIOD APRIL 13, 1977 THROUGH OCTOBER 19, 1977, HOW MANY

PROGRAMS DID YOU SURVEIL AT THE MITCHELL BROTHERS' SANTA ANA THEATER?

A THERE WERE 12.

Q DURING THAT PERIOD OF TIME, DID YOU MISS ANY PROGRAMS THAT WERE SHOWN AT THE THEATER?

A NO.

THE COURT: THAT DATE AGAIN WAS WHAT?

MR. CLANCY: APRIL 13, 1977, THROUGH OCTOBER 19, 1977.

THE COURT: YOU MAY PROCEED.

Q BY MR. CLANCY: DURING THE PERIOD JULY 16, 1978, THROUGH THE PERIOD OCTOBER 19, 1978, HOW MANY PROGRAMS DID YOU SURVEIL?

A THIRTEEN.

Q DID YOU MISS ANY PROGRAMS DURING THAT PERIOD?

A NO.

Q APPROXIMATELY HOW MANY FILMS HAVE YOU SURVEILLED AT THE MITCHELL BROTHERS' SANTA ANA THEATER?

A IN EXCESS OF 500.

Q OVER WHAT PERIOD OF TIME WAS THIS?

A FROM 1975, I BELIEVE, THROUGH THE PRESENT.

Q HAVE ALL OF THESE FILMS DEPICTED EXPLICIT SEXUAL ACTIVITY?

A ALL EXCEPT FOR A THREE-MONTH PERIOD JANUARY THROUGH MARCH OF 1979.

Q NOW, WHAT DO YOU UNDERSTAND THE PHRASE "EXPLICIT SEXUAL ACTIVITY" TO MEAN?

A THAT WOULD MEAN SCENES SHOWING ACTUAL SEXUAL INTERCOURSE, ORAL COPULATION, EJACULATION, SODOMY.

Q HOW DID THE FILMS WHICH WERE PORTRAYED DURING THE THREE-MONTH PERIOD THAT YOU MENTIONED DIFFER FROM THE OTHERS?

A THEY WERE LESS EXPLICIT.

Q NOW, WOULD YOU EXPLAIN THAT?

A THE FILMS WERE THE SAME EXCEPT THAT THEY DIDN'T SHOW THE ACTUAL SEXUAL INTERCOURSE, FELLATIO, WHICH IS ORAL COPULATION, EJACULATION OR SODOMY SCENES.

Q DID THEY SHOW WHAT PURPORTED TO BE SEXUAL INTERCOURSE?

A YES.

Q WHEN YOU SAY -- WHAT WAS DIFFERENT IN THE TWO PORTRAYALS?

A IN THE SEXUAL INTERCOURSE DEPICTIONS, THERE WAS NO PENETRATION SHOWN, THERE WAS NO PENETRATION SHOWN IN THE ORAL COPULATION SCENES OF THE SODOMY SCENES, NO EJACULATIONS SHOWN.

Q DURING THIS PERIOD THAT YOU PREVIOUSLY TESTIFIED TO, TWO PERIODS, YOU DID SURVIIL THE FILMS "THROUGH THE LOOKING GLASS" AND "EXPOSE ME LOVELY"; DID YOU NOT?

A YES.

Q HAVE YOU RECENTLY HAD OCCASION TO OBSERVE THESE SAME FILMS BEING EXHIBITED ON T.V.?

A YES.

Q ON WHAT T.V. PROGRAM WERE THEY EXHIBITED?

A THEY WERE ON THE "ON T.V."

Q HOW RECENTLY WAS THAT?

A WITHIN THE PAST FEW MONTHS.

Q WERE THERE ANY DIFFERENCES BETWEEN THE TWO EXHIBITIONS, THAT IS THE EXHIBITION OF "THROUGH THE LOOKING GLASS" AND "EXPOSE ME LOVELY" THAT YOU SAW AT THE MITCHELL BROTHERS' AND THE EXHIBITION OF "THROUGH THE LOOKING GLASS" AND EXPOSE ME LOVELY" ON "ON T.V."?

A YES.

Q WHAT WAS THAT DIFFERENCE?

A THE "ON T.V." SHOWED DEPICTIONS OF THE FILM THAT WERE LESS EXPLICIT.

Q WERE THE DIALOGUES IN THE TWO -- WERE THE DIALOGUES THE SAME IN BOTH THE SANTA ANA PRESENTATION AND THE T.V. PRESENTATION?

A YES.

Q WERE THERE ANY OTHER FILMS WHICH HAD BEEN EXHIBITED AT THE MITCHELL BROTHERS' THEATER WHICH YOU HAVE SURVEILLED WHICH

YOU HAVE ALSO OBSERVED TO HAVE BEEN ON T.V.?

A YES.

Q WHAT FILMS WERE THOSE?

A ONE WAS CALLED "THE LEGEND OF LADY BLUE" AND THE OTHER -- CAN I CHECK SOME NOTES?

Q YOU HAVE NO PRESENT RECOLLECTION WITHOUT REFERENCE TO THOSE?

A JUST THE TITLE EXCAPES ME RIGHT NOW.

Q ALL RIGHT. WOULD YOU PLEASE RETURN TO YOUR NOTES.

A "TEMPTATIONS."

Q NOW, WERE THERE ANY DIFFERENCES BETWEEN THE PORTRAYALS OF "THE LEGEND OF LADY BLUE" AND "TEMPTATIONS" AS SHOWN AT MITCHELL BROTHERS' SANTA ANA THEATER AND AS EXHIBITED ON "ON T.V."?

A YES.

Q WHAT WERE THE DIFFERENCES?

A THAT THE ONES SHOWN ON T.V. WERE AGAIN LESS EXPLICIT IN THEIR SEXUAL

SCENES.

Q WERE THE DIALOGUES THE SAME?

A YES.

Q WERE THE PLOTS THE SAME?

A YES.

Q WERE THERE ANY ADDITIONAL SCENES OR DELETED SCENES?

A IN "THE LEGEND OF LADY BLUE" THERE WAS A SHORT SEGMENT THAT I DID NOT RECALL SEEING IN THE MITCHELL BROTHERS' THEATER. IT DIDN'T CONTAIN ANY SEXUAL SCENES.

Q ON THE FOUR THAT YOU HAVE STATED YOU HAVE OBSERVED EXHIBITED ON T.V., HAVE YOU OBSERVED THOSE FOUR IN THEIR ENTIRETY?

A YES.

THE COURT: THE FOUR AGAIN WERE WHICH FOUR?

MR. CLANCY: "THROUGH THE LOOKING GLASS" AND "EXPOSE ME LOVELY."

THE COURT: ALL RIGHT. AND THEN THESE LAST TWO; IS THAT IT?

MR. CLANCY: "LEGEND OF LADY BLUE" AND

"TEMPTATIONS."

THE COURT: ALL RIGHT. NOW WHAT IS IT ABOUT THE FOUR YOU WANT TO KNOW?

MR. CLANCY: WELL, HE'S ALREADY -- EXCUSE ME, YOUR HONOR.

THE COURT: WELL, I WAS TRYING TO MAKE SOME NOTES WHILE YOU WERE ASKING THE QUESTION. I MISSED THE WHOLE THOUGHT OF YOUR QUESTION. PERHAPS THE BEST WAY IS TO HAVE THE REPORTER READ IT BACK, PLEASE.

(THE RECORD WAS READ BACK.)

THE COURT: THANK YOU.

Q BY MR. CLANCY: WERE THE SOUND TRACKS WHICH YOU HEARD AT THE MITCHELL BROTHERS' THEATER THE SAME AS THE SOUND TRACKS ON T.V.?

A YES.

Q HAVE YOU PERFORMED SIMILAR SURVEILLANCE DUTIES FOR OTHER CITIES?

A YES.

Q WHAT CITIES WERE THOSE?

A DUARTE AND THE CITY OF LOS ANGELES.

Q DID YOU PERFORM SURVEILLANCE FOR PEOPLE EX REL BUSCH VERSUS PROJECTION ROOM THEATER?

A YES.

Q DID YOU PERFORM --

MS. BRADFORD: YOUR HONOR, I OBJECT. I WOULD ASK COUNSEL TO LAY A FOUNDATION AS TO THE RELEVANCE OF THIS INQUIRY.

THE COURT: WHAT IS THE RELEVANCE OF THIS INQUIRY AS TO HIS OTHER EXPERIENCE?

MR. CLANCY: WELL, YOUR HONOR, THE -- HIS TESTIMONY WOULD BE THAT THE TIME AND MOTION STUDIES WHICH WERE PREPARED WERE ESSENTIALLY THE SAME AND ATTACHED TO THE COMPLAINT IN THE PEOPLE VERSUS BUSCH CASE WHICH WAS RULED UPON BY THE SUPREME COURT.

MS. BRADFORD: SAME OBJECTION, YOUR HONOR.

THE COURT: THE CASE WAS RULED ON BY THE SUPREME COURT. ARE YOU SUGGESTING IN THE BUSCH CASE THE SUPREME COURT RULED THE TIME AND MOTION STUDIES MIGHT BE RECEIVED IN PLACE OF THE ACTUAL FILM?

MR. CLANCY: NO, YOUR HONOR.

THE COURT: THEN WHAT IS THE RELEVANCE OF THIS?

MR. CLANCY: WELL, THE RELEVANCY IS THAT THE TIME AND MOTION STUDIES WERE INCORPORATED AND WERE BEFORE THE SUPREME COURT. I WOULD ALSO ASK THE COURT TO TAKE JUDICIAL NOTICE OF -- WHICH I AM SURE I AM GOING TO BE OVERRULED ON -- AN OPINION OF THE COURT OF APPEALS IN WHICH THEY COMMENTED UPON THE TIME AND MOTION STUDIES SPECIFICALLY. I UNDERSTAND, HOWEVER, THAT I CANNOT CITE THE CASE TO THE COURT, BUT I'D ASK THE COURT TO TAKE JUDICIAL NOTICE, AND I WOULD BE PREPARED TO FILE A COPY WITH THE COURT.

THE COURT: IT'S AN UNPUBLISHED OPINION?

MR. CLANCY: IT WAS PUBLISHED, BUT THEN WHEN THE HEARING WAS GRANTED, BECAME SUPERSEDED BY THE CALIFORNIA SUPREME COURT DECISION.

THE COURT: WELL, YOU ARE RIGHT. THE

COURT WILL DENY YOUR MOTION TO TAKE JUDICIAL NOTICE OF IT. AND THE OBJECTION TO THIS LAST QUESTION REGARDING THE WITNESS' EXPERIENCE FOR OTHER CITIES IS SUSTAINED.

MR. CLANCY: I HAVE NO FURTHER QUESTIONS, YOUR HONOR.

THE COURT: CROSS EXAMINATION.

CROSS EXAMINATION

Q BY MS. BRADFORD: MR. MC GUIRE, WHERE WERE YOU WHEN YOU VIEWED THESE FILMS ON TELEVISION?

A PARDON ME?

Q WHERE WERE YOU LOCATED? IN WHAT CITY OR --

A IN THE COUNTY OF LOS ANGELES.

Q ON WHAT TELEVISION CHANNEL?

A IT'S "ON T.V." CHANNEL WHICH I BELIEVE IS 6 OR 52.

Q AND WHEN DID YOU VIEW THESE FILMS?

A DURING THE PAST FEW MONTHS. I DON'T HAVE SPECIFIC DATES IN FRONT OF ME, BUT

DURING THE PAST FEW MONTHS.

Q DOES THIS T.V. STATION SHOW OTHER SEXUALLY EXPLICIT FILMS? ARE THESE THE ONLY FOUR FILMS YOU HAVE VIEWED ON THAT STATION, OR IS THAT A REGULAR PROCEDURE OF THAT TELEVISION STATION?

A YES, I HAVE SEEN OTHERS ON THAT.

Q HOW MANY OTHERS WOULD YOU SAY?

A I WOULD SAY ABOUT 12 -- APPROXIMATELY 12.

Q AND WHEN YOU SAY THAT THE PROGRAMS -- YOU HAVE STATED THE PROGRAMS ON T.V. WERE LESS EXPLICIT. WHEN YOU USE THE TERM "EXPLICIT," IS THAT -- DO YOU MAKE THAT SYNONYMOUS WITH THE WORD "OFFENSIVE"?

A I DON'T -- I DON'T HAVE ANY OPINION ON THAT.

Q COULD YOU -- WHEN YOU SAY THE PROGRAMS WERE LESS EXPLICIT, YOU SAY THEY ARE REPRESENTING THE SAME ACTS BUT --

A YES. IN THE SCENES THAT WERE LESS EXPLICIT, THE ACTUAL PENETRATION -- IN THE

CASE OF SEXUAL INTERCOURSE, THE INTERCOURSE WAS NOT ACTUALLY SHOWN, RATHER THAT TWO BODIES WERE LYING TOGETHER IN A SEXUAL INTERCOURSE POSITION.

Q BUT -- LIKE CLOSE-UPS OF ACTUAL PENETRATION --

A WERE NOT SHOWN, AND IN CLOSE-UPS OR FAR AWAY SHOTS, COULD NOT SEE ANY PENETRATION.

Q WERE THE MOVIES APPROXIMATELY THE SAME LENGTH THAT THEY WERE WHEN YOU SAW THEM AT THE THEATER?

A YES.

Q AND AS FAR AS YOU KNOW, THAT T.V. PROGRAM IS STILL SHOWING THE SAME TYPE OF MOVIE?

A YES.

MS. BRADFORD: I HAVE NO FURTHER QUESTIONS.

THE COURT: REDIRECT.

REDIRECT EXAMINATION

Q BY MR. CLANCY: MR. MC GUIRE, HAVE

YOU OBSERVED THAT THE APPEARANCE OF THIS TYPE OF A FILM ON T.V. HAS BEEN SOMETHING OF A RECENT OCCURRENCE?

MS. BRADFORD: YOUR HONOR, I OBJECT. THAT DOES NOT RELATE TO CROSS EXAMINATION.

THE COURT: OVERRULED.

THE WITNESS: YES.

Q BY MR. CLANCY: AND APPROXIMATELY HOW RECENT?

A I WOULD HAVE TO GUESS ABOUT THE LAST SIX MONTHS OR SO.

MR. CLANCY: THAT'S ALL, YOUR HONOR.

THE COURT: RECROSS.

MS. BRADFORD: NO FURTHER QUESTIONS.

THE COURT: THANK YOU, SIR. YOU MAY STEP DOWN. EITHER COUNSEL NEED THIS WITNESS FURTHER?

MR. CLANCY: NO, YOUR HONOR.

MS. BRADFORD: NO, YOUR HONOR.

THE COURT: YOU ARE EXCUSED, SIR.

NEXT WITNESS.

MR. CLANCY: YOUR HONOR, THE PLAINTIFF

RESTS.

****

REPORTER'S CERTIFICATE

I, LINDA C. NAVARRO, CSR #2967, DO HEREBY CERTIFY THAT THE FOREGOING REPORTER'S PARTIAL TRANSCRIPT, FROM PAGE 1 THROUGH PAGE 11, INCLUSIVE, IS A FULL, TRUE AND CORRECT TRANSCRIPT OF MY SHORTHAND NOTES OF THAT PORTION OF THE PROCEEDINGS HAD IN SAID CAUSE.

/s/ Linda C. Navarro CSR
REPORTER PRO TEMPORE

DATED: July 24, 1981

APPENDIX N

(Reference: Petition at pg. 65.)

Santa Ana Register news article, dated August 2, 1981, reporting on the City of Santa Ana's four lawsuits against the Mitchell Brothers' Santa Ana Theater.

.....N-1 Thru N-5

The Register
Sunday, August 2, 1981 B1
Metro

Santa Ana fails to e(X)ile porno kings

Mitchell Brothers appear to be victors in full-scale war over X-rated movies

By Michael Runzler
Register staff writer

After six years, $169,572 in legal fees and four drawn out lawsuits, Santa Ana officials seem ready to toss in the towel in their continuing fight to close the Mitchell Brothers' X-rated motion picture theater.

That's because for the first time since the crusade against the pornographic movie house began, the City Council has not budgeted any money to carry on the fight.

And the Mitchells, who once faced court-ordered payments totaling $176,000, are instead close to receiving at least $16,000 from the city for their expenses.

Furthermore, Mayor Gordon Bricken recently said he is not so sure that once red-hot public sentiment against the theater has not cooled.

So far, the city has won some battles but not its war to close the X-rated cinema that sits in a shopping center across the street from a church and Santa Ana College.

City victories have come as courts banned a long list of films, such as "Anita, the Swedish Nymphet," "Story of Joanna" and "The Devil in Miss Jones" from screening at the theater.

But as quickly as Anita, Joanna and Miss Jones have

been declared obscene by judge or jury, other porno epics have taken their place on the marquee.

Consequently, an estimated 100,000 county residents a year continue to pay $5 each to view the latest pornographic offerings of the brothers Mitchell.

Meanwhile the two brothers from San Francisco, who have parlayed a $10,000 loan into a porn empire that includes the production, distribution and sale of X-rated films and tapes, have seen their battle with Santa Ana:

- Carry to Independence Hall at Knott's Berry Farm where judges charged with determining obscenity have watched their films in a special screening room.
- Result in four Santa Ana city councilmen being sued for plagiarism because they ordered photographs and tape recordings made of movies shown at the theater.
- Draw attention in Playboy Magazine after two undercover Santa Ana police officers posed as a gay couple to take advantage of an admission discount offered to couples.
- Cause one Orange County judge to order his female bailiff and clerk out of the court while he viewed films shown at the theater.

Through it all, the Mitchells never have shut their doors and the moviegoers have continued to flow to their theater.

The Santa Ana-Mitchell Brothers bout began in September, 1975, when the Mitchells leased a sedate United Artists theater in Honer Plaza on 17th Street. The local movie house, where neighborhood youngsters used to watch Walt Disney films, became the 10th theater in the brothers' statewide chain.

Immediately there were protests.

Residents formed Citizens Against Pornography and filled the City Council chambers to demand that the X-rated movies go. They armed themselves with protest petitions bearing 7,000 signatures.

They found a willing ally and champion in then-Councilman Harry Yamamoto, who joined them on picket lines in an attempt to discourage theater patrons.

But Santa Ana's point man has been James Clancy, the attorney retained to work on the case.

Clancy is a Naval Academy graduate and one-time submarine officer described by many as a zealot.

He has dedicated his legal career to purging society of pornography and, as an active voice in the Citizens for Decency Through Law, has carried his crusade nationwide.

His purpose, he said, is to preserve order in society.

"(Pornography) always has been used throughout the ages as a means of destroying order — order within the family, order within the community, order within the system. It's a tool of revolution," he said.

Given the choice between good and evil, Clancy said man will choose the evil road and must be prodded toward the good.

In contrast, the Mitchells got into the pornography business in the mid-'60s with a borrowed 8mm camera, some black and white film and a $10,000 loan from their mother.

They graduated from shorts, to color and then to a $500,000 extravaganza called "Sodom and Gomorrah" and were dubbed the "Potentates of Porn" by Time Magazine. Jim Mitchell claims that the Mitchell Brother films serve a high purpose — the elimination of sexism.

"I think we can eliminate racism, and nationalism and everthing else if we could eliminate sexism. The men have been the real leaders in holding pornography down and hating it because they want to keep women as property."

The city's four lawsuits are named after former City Attorney Keith Gow who began the litigation and are differentiated by Roman numerals, like Super Bowls.

● Gow I comes the closest to being complete. In a late 1977 trial, the city alleged that 41 films shown at the theater were obscene. Ultimately the jury concluded that 11 of the movies were, in fact, obscene and assessed $76,400 in penalties.

But several years and numerous appeals later, an appellate court ruled that the city is not entitled to damages.

In addition, Superior Court Judge Luis Cardenas recently ordered that the Mitchell's receive $16,260 for their trial and appeal costs.

● Gow II and III were combined and the city received a temporary injunction banning the screening of 50 films after a judge viewed them privately at Knott's Independence Hall.

During a trial held last month Judge Claude Owens viewed six of the films with attorneys in his courtroom. A ruling is pending.

● Gow IV names 42 more titles and is set for trial Sept. 1 in Orange County Superior Court.

The trials result from civil and not criminal complaints. Each suit is based on an ordinance against lewd films that enables the city to close porno houses as public nuisances.

Meanwhile, the city has ignored the Guild Theater, another porno house operating on a downtown street almost in the shadow of city hall. As a result, the Guild legally can show movies banned at the Mitchells' theater.

To assist the council in determining whether the films indeed are obscene, an off-duty, undercover policeman surreptitiously photographed and tape recorded each and every film.

The product was combined into what Clancy calls time-motive studies and given to councilmen to review.

But the procedure resulted in four councilmen, including Bricken, being named as defendants in a copyright in-

fringement lawsuit filed by the Mitchells.

The brothers said city officials broke federal law by ordering reproductions of their copyrighted films.

A federal court jury disagreed.

While public sentiment may have changed, Bricken's mind has not.

"Personally I support the objective of eliminating as much of this type of entertainment in the community. But whether this . . . is working, I don't know," he said.

"If the objective was to put them out of business, we have failed. If the effort was to keep them under control, then we've succeeded."

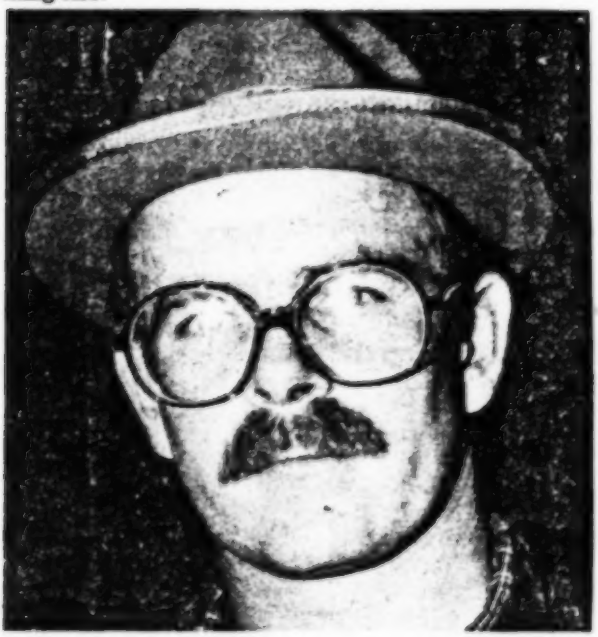
Like Clancy, Bricken sees the Mitchell brothers' pornography as contributing to the degeneration of society.

"I don't think that society has ever benefited by anything that lowers the dignity of the human being," he said. "The theme of every one of their films is that women are there to be used."

But in Jim Mitchell's mind, society is more than ready to accept, and endorse, his products.

"If no one voted you wouldn't have a politician. If no one read your paper you wouldn't have a paper," he said.

"If no one came to the theater, we wouldn't have a theater. It takes more than a building and a film. It takes viewers. That third party, they keep us there. Not anything else."



Jim Mitchell
Helped build a pornography empire

Ad for a film as it appears in Mitchell Brothers catalog.

Opposition

Office-Supreme Court, U.S.
FILED
SEP 8 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-271

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1981

EDWARD COOPER, CITY ATTORNEY OF THE CITY OF SANTA ANA,
Petitioner,

vs.

MITCHELL BROTHERS' SANTA ANA THEATER, et al.,
Respondents.

On Petition for a Writ of Certiorari to the California Court of Appeal, Fourth Appellate District

RESPONDENTS' BRIEF IN OPPOSITION

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents, Mitchell Brothers' Santa Ana Theater, M.B.F.G. Theater Circuit, Inc., Jim Gish, James Mitchell, Artie Mitchell, Demich, Inc., Mitchell Brothers' Film Group, and Cinema 7, Inc., respectfully request that this Court deny the Petition for Writ of Certiorari seeking review of the opinion of the California Court of Appeal, Fourth Appellate District, in this case. That opinion is published at 114 Cal.App.3d 923, 171 Cal.Rptr. 85, and is, but for typographical errors, reproduced at pages A-1 through A-36 of the petition.

STATEMENT OF THE CASE

Respondents do not believe that petitioner's Statement of the Case omits any salient facts, but feel that a more concise version may prove helpful.

In November, 1976, the Santa Ana City Attorney, at the direction of the City Council, filed a civil action in the California Superior Court against respondents and several others[1], alleging that some forty-one films exhibited at a motion picture theater were obscene, and the theater was a public nuisance.

The matter went to trial in October, 1977. Trial was bifurcated with the issue of obscenity of the films first being submitted to a jury instructed that the plaintiff had the burden of proving this beyond a reasonable doubt, following which the jury tried the City's claim for actual and punitive damages. Finding eleven of the films obscene, the jury awarded actual damages of $76,400, declined to award punitive damages, and found the theater had been a public nuisance during the time those eleven films were being exhibited.

Thereafter, the trial court, independently finding the eleven films to be obscene, enjoined further showing or advertising of those films, ordered their destruction, ordered that for a period of two years the officers of the City could have full access to all parts of the theater to monitor its operations, and required deposit of a $100,000 cash bond

---

[1]The other parties are the owners and sublessors of the real property on which the theater is located and by stipulation were not involved in the trial.

by the respondents to cover future attorney's fees and costs to the City in any subsequent civil actions to abate a public nuisance at the theater.

The trial court declined to close the theater premises for a period of one year, to revoke the theater permit, to impose a constructive trust on all monies received from exhibition of the films, or to award attorney's fees to the City.

Both parties appealed. The Court of Appeal affirmed that part of the judgment which enjoined future exhibition and advertising of the eleven films found to be obscene, and in all other respects reversed the judgment.

REASONS WHY THE WRIT SHOULD BE DENIED

I

The petition should be denied because of its flagrant disregard of this Court's Rules of brevity and clarity

Supreme Court Rule 23(4) provides that failure of a petitioner to:

> "... present with accuracy, brevity, and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying his petition."

A mere glance through the petition shows that it lacks both brevity and clearness. This lack might be said to be the hallmark of counsel for the petitioner, Mr. James J. Clancy. *See, Huffman v. Pursue* (1974) 419 U.S. 892, in which Mr. Clancy's brief was stricken; Stern and Gressman, *Supreme Court Practice* (5th Ed.) Section 13.3, pp. 696-697, discussing the other papers filed in *Huffman*, similar to the instant petition, even to the inclusion of photographs

so small as to defy understanding; and the comment of Ms. Justice Morris, in the opinion below, of the flagrant disregard of Rule 13 of the California Rules of Court (Pet. A-8, note 5).

That the petition lacks accuracy is discussed in the following section, but it is worth noting here that even the order of presentation of the matters in the petition fails to follow the requirements of Rule 23(1).

Such flagrant and persistent disregard of this Court's rules by an experienced counsel who has previously been warned is sufficient grounds for denying the petition.

II

The decision below does not raise any of the questions presented in the petition

None of the questions here presented are found in the opinion below.

This Court has consistently held that it will not review a state court's decision which rests on adequate state grounds, even though a federal ground may also be involved. *Klinger v. Missouri* (1872) 13 Wall. 257, 263; *Fox Film Corp. v. Muller* (1935) 296 U. S. 207, 210; *See, Illinois v. Grayson* (1975) 421 U. S. 994. In the case below, a federal question was discussed, but the decision rests fully on interpretation of the California law of public nuisance rather than any federal constitutional question.

a. The first question presented is whether the United States Constitution prohibits the closing of a motion picture theater as a prior restraint (Pet. i). But the Court of

Appeal did not base its holding on constitutional grounds. Rather, it determined that the nuisance sought to be abated in this case was the exhibition of obscene motion pictures, and that neither the films themselves nor the theater were nuisances under the California statutory scheme. (Pet. A-15, A-16). *See, People ex rel. Busch v. Projection Room Theater* (1976) 17 Cal.3d 42, 49-53, 130 Cal.Rptr. 328, 550 P.2d 600. The Court of Appeal did discuss the constitutional issue in a footnote (Pet. A-15, note 9), but that was not the basis for its holding.

b. The second question presented is whether this Court's decision in *Vance v. Universal Amusement Co., Inc.* (1980) 455 U. S. 308, requires that the issue of obscenity in civil public nuisance cases be determined only by proof beyond a reasonable doubt. This question is both misleading as to the opinion below, and a gratuitous insult to the intelligence of the learned Justices of the Court of Appeal.

Nowhere in the *Vance* opinion of this Court is there any mention of the burden of proof. Nowhere in the opinion below is there any hint that *Vance* was relied on in establishing the proper burden of proof in California public nuisance cases. Instead, the Court of Appeal expressly stated that it was *persuaded* by the reasoning of Mr. Justice Brennan in his concurring opinion in *McKinny v. Alabama* (1976) 424 U. S. 669, 678 (Pet. A-28, A-29). It cannot be seriously argued that the Court below believed itself bound by that concurring opinion. The Court of Appeal was formulating a procedure for applying the California public nuisance law to an action for the abatement of the exhibition of obscene motion pictures, and was

not determining a federal question. Most certainly the opinion below does not raise any burden of proof question found in *Vance*.

c. The third question is whether the Court of Appeal's interpretation of the *Vance* case denied the Santa Ana City Attorney, in his official capacity, his rights under the Ninth, Tenth and Fourteenth Amendments to the United States Constitution.

This question must be frivolous. The Court of Appeal's opinion shows clearly that it relied on the earlier California case of *Busch, supra,* published four years prior to *Vance,* and at no place in the opinion below is there any suggestion that *Vance* was the controlling case in the decision to overturn all but the permanent injunction of the several remedies awarded by the trial court (Pet. A-18, A-19).

Further, at no place in his argument does petitioner explain what rights under the cited amendments were violated, nor even what rights under those amendments can be claimed by a city official in his official, rather than personal capacity. *See, Williams v. Mayor and City Council of Baltimore* (1933) 289 U.S. 36, 40; *New York v. Richardson* (2d Cir. 1973) 473 F.2d 923, 926, *cert. den.,* 412 U.S. 950.

Certainly these arguments are not self-evident. The Ninth Amendment provides that public rights of the people are neither denied nor disparaged because certain rights are set forth in the United States Constitution; the Tenth Amendment deals with the rights of the states to

exercise powers independently of the federal government; and the Fourteenth Amendment deals with the rights of individuals against the several states. Without further elucidation it is necessary to guess what petitioner is driving at.

CONCLUSION

The foregoing Petition for Writ of Certiorari is neither brief, clear, nor accurate, and does not raise any federal question. It is respectfully requested that the petition be denied.

Dated: September 3, 1981.

Respectfully submitted,

ROBERT L. THORP
Counsel for Respondents

Petitioner's Reply Brief

Office - Supreme Court, U.S.
FILED
NOV 20 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-271

In the Supreme Court of the United States

October Term, 1980

PEOPLE OF THE STATE OF CALIFORNIA ex rel. EDWARD COOPER, CITY ATTORNEY OF THE CITY OF SANTA ANA, CALIFORNIA,

Petitioner,

vs.

MITCHELL BROTHERS' SANTA ANA THEATER, located at 1565 West 17th Street, Santa Ana, County of Orange, California; M.B.F.G. THEATER CIRCUIT, INC.; JIM GISH; ALLISON HONER CO., a partnership; UNITED ARTISTS THEATER CIRCUIT, INC.; CONTINENTAL AUXILIARY COMPANY, a California Corporation; BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, a National Banking Association; JAMES MITCHELL; ARTIE MITCHELL; DEMICH, INC., a California Corporation; MITCHELL BROTHERS FILM GROUP, a General Partnership; CINEMA 7, INC., a California Corporation; Does 1 through 100, inclusive,

Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION TWO

PETITIONER'S REPLY AND SUPPLEMENTAL BRIEF

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No. 81-271

In the Supreme Court of the United States

October Term, 1980

PEOPLE OF THE STATE OF CALIFORNIA ex rel. EDWARD COOPER, CITY ATTORNEY OF THE CITY OF SANTA ANA, CALIFORNIA,

Petitioner,

vs.

MITCHELL BROTHERS' SANTA ANA THEATER, located at 1565 West 17th Street, Santa Ana, County of Orange, California; M.B.F.G. THEATER CIRCUIT, INC.; JIM GISH; ALLISON HONER CO., a partnership; UNITED ARTISTS THEATER CIRCUIT, INC.; CONTINENTAL AUXILIARY COMPANY, a California Corporation; BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, a National Banking Association; JAMES MITCHELL; ARTIE MITCHELL; DEMICH, INC., a California Corporation; MITCHELL BROTHERS FILM GROUP, a General Partnership; CINEMA 7, INC., a California Corporation; Does 1 through 100, inclusive,

Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION TWO

PETITIONER'S REPLY AND SUPPLEMENTAL BRIEF

Pursuant to Rule 22.5 and 22.6 of the U.S. Supreme Court Rules, Petitioner People of the State of California ex rel. Edward Cooper, City Attorney of the City of Santa Ana, now files the following

combined Reply Brief to Respondents' Brief in Opposition, and Supplemental Brief, the latter of which addresses itself to new cases and other intervening matter not available at the time of filing the Petition for Writ of Certiorari herein.

ARGUMENT

I

THE RECORD DOES NOT SUPPORT THE RESPONDENTS' CLAIM THAT THE DECISION BELOW ON "CLOSURE" RESTS FULLY ON AN INTERPRETATION OF THE CALIFORNIA LAW OF PUBLIC NUISANCE RATHER THAN ANY FEDERAL CONSTITUTIONAL QUESTION.

Mr. Thorpe's claim on behalf of the respondents (see Respondents' Brief in Opposition at page 4) that the constitutional issue of "closure" can be avoided is not supported by the record in this case.

To obviate federal review, the state ground must be "adequate and independent". The rationale of the adequate and independent state ground rule has been explained as follows in Herb v. Pitcairn,

324 U.S. 117, 125-26 (1945):

> ". . . Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of Federal laws, our review could amount to nothing more than an advisory opinion."

This is not a case in which the same judgment would be rendered by the state court after its view of Federal law has been corrected. The trial judge has said that a different result would be reached if the federal law on "closure" is other than he perceives it to be.

In opposition to the respondents' claim, petitioner has attached hereto at Appendix "A" a copy of the reporter's transcript of the settlement conference on the Findings of Fact and Conclusions of Law which took place in the trial court on May 2, 1978, in which Mr. Thorpe

participated. At that conference, Mr. Thorpe objected to Judge Weeks' Conclusion of Law XVI (Plaintiff's proposed conclusion of law 26) regarding "closure" as being a criticism of existing law. See the reporter's transcript for May 2, 1978 at page 55, lines 3-7:

> ". . . It strikes me as saying that 'I really want to do this but I can't because of the Constitution of the United States'. . . pardon me,. . . to say: 'this would be very proper but for the fact that we have a constitution. . .'"

In his reply, Judge Weeks noted that his Conclusion of Law was intended as a statement of the law, not a criticism of the law, and that he:

> "would have closed this theater based on the law if it were not for the Busch case and the Constitution."

See the reporter's transcript at page 54, line 5 through page 57, line 17, a copy of which appears herein at Appendix A and, in particular, page 56, line 25 through page 57, line 17 appearing herein at A-5

reading:

> "THE COURT: . . . As I see it, that if the Appellate Court disagrees with my Conclusion of Law as stated in Busch and the Constitution, then they may see fit to reverse my decision, you see, based on this enumerated set of circumstances, and that is the way I see it, and I think that the atmosphere of the community and the cases are such that the Court, the Appellate Court, whichever one it is, here or in San Francisco or in Washington D.C. should have the opportunity to know that this little guy, that is sitting down here by assignment from the Municipal Court recognized that he would have closed this theater, based on the law, if it were not for the Busch case and the Constitution and that's all that I wish to portray in this Conclusion. And so, while I accept your position that, because it is stated that way, that it is critical of the law, it is not intended to be. It is simply intended to be my opinion of a correct status of what the law is, and what the facts were in this particular case."

In the above discussion, Judge Weeks was contemplating his judicial power, sitting as a Court of Equity, to close a parcel of real property which had been found to constitute a public nuisance per se, and interpreting the restrictions

which are placed on such power by the U.S. Constitution. He was not considering a separate and independent provision of the California law on public nuisance abatement.

It was the general powers of Judge Weeks, sitting as an Equity Court, and the federal restrictions on those powers, under the Federal Constitution, that the Court of Appeals addressed itself to, in footnote 9 of its opinion (see Respondents' Brief in Opposition at page 5, lines 8-10).

II

A RECENT CALIFORNIA APPELLATE DECISION HOLDS, CONTRARY TO THE RULING OF THE COURT OF APPEAL BELOW, THAT UNDER THE COMMON LAW AN EQUITY COURT HAS "BROAD DISCRETION" TO AWARD DAMAGES IN LIEU OF CLOSURE, WITH THE OBJECTIVE OF PREVENTING SUCH (MORAL) PUBLIC NUISANCES.

At Point III, pages 60-65 of its petition for Writ of Certiorari, petitioner contends that, by denying the City the judicial remedies which are

necessary for suppression (i.e., by limiting judicial relief to a personal injunction against a specific film which can and does not become effective until long after the film has been exhibited), the Court below has wrongfully given its sanction to a moral public nuisance, and has deprived the plaintiff as the authorized law officer representing the residents of the City of Santa Ana of Federal rights under the 9th, 10th and 14th Amendments to the U.S. Constitution.

Petitioner invites this Court's attention to the recent decision of the California Court of Appeal, Second Appellate District, Division 1 in People ex rel. Van deKamp v. American Art Enterprises, Inc., et al., 81 Daily Journal D.A.R. 3209, decided within the past 2 weeks. A copy of that opinion, as reported in the Los Angeles Daily Law Journal on Tuesday, November 3, 1981, is

encorporated in this brief at Appendix "B". The Art Enterprises, Inc. decision supports the above described claim of the petitioner, in that the Court of Appeal, Second Appellate District, Division 1, has refused to follow the restrictive interpretation which was given to the public nuisance statutes by the Court of Appeal (Fourth Appellate District) herein.

In Art Enterprises, Inc., supra, the Court discribed the unlawful use of the real property to be as follows:

> ". . . the Lassen Street premises were 'used as the headquarters of various entities constituting a corporate empire engaged in the publication and distribution of pornographic materials. The editorial, publication, administration, art, and photographic development activity of the entities are housed in the 20,000 square feet of the 120,000 square foot building with the remainder devoted to storage of books, magazines and photographs. One-third of the stored material consists of photographs of explicit sex activity, and one-third . . . of simulated sex, and one-third printed material without photographs. At least 100 persons are employed on the

premises.' (American Art (1977), at p. 527.)"

After finding that a public nuisance had been established, the trial court rendered its judgment and awarded the People "a damage award equivalent to one year's rent" (the reasonable value of which was found to be $168,000) in lieu of evicting the tenant of the defendant from the premises. In affirming the judgment of the trial court, the Court of Appeal, Second Appellate District, Division 1 held, contrary to the Court of Appeal below, that an Equity Court has "broad discretion " and that the trial court had "appropriately exercised its broad discretion by the imposition of damages, with the objective of preventing such nuisances as this."

III

AN APPEAL WAS PERFECTED IN U.S. MARKETING, INC. V. STATE OF IDAHO EX REL. KIDWELL, ET AL. ON OCTOBER 15, 1981 AND THAT CASE IS NOW DOCKETED IN THIS COURT AS NO. 81-741. ACCORDINGLY, THE FEDERAL QUESTION AS TO WHETHER AN EQUITY COURT HAS THE POWER TO CLOSE REAL PROPERTY FOR PAST WRONGFUL CONDUCT (AFTER A JUDICIAL DETERMINATION MADE PURSUANT TO CONSTITUTIONALLY ACCEPTABLE PROCEDURES THAT SUCH REAL PROPERTY HAS BEEN USED TO TRADE IN OBSCENITY AS A REGULAR COURSE OF BUSINESS AND IS A PUBLIC NUISANCE) IS NOW SQUARELY BEFORE THIS COURT FOR DECISION.

In its "Reasons for Granting the Writ", see Petition for Writ of Certiorari at page 48, Petitioner asked this Court to exercise its judicial discretion and grant the writ under Rule 17.1(b) of the United States Supreme Court on the ground that:

> ". . . a state court of last resort (California Court of Appeal, Fourth Appellate District, Division 2) has decided a federal question (closure of the premises) in a way in conflict with the decision of another state court of last resort (Idaho Supreme Court . . ."

Petitioner now calls this Court's attention to an intervening matter; i.e.,

that an appeal was perfected on October 15, 1981 from the Idaho Supreme Court decision referred to in the Petition for Writ of Certiorari, and has been docketed in this Court as U.S. Marketing, Inc. v. State of Idaho ex rel. Kidwell, et al., No. 81-741. In as much as this Court's jurisdiction over appeals is obligatory, see Frankfurter and Landis, The Business of the Supreme Court: A Study in the Federal Judicial System (1972), pp. 257, it would appear that the federal question of "closure" which has been presented to this Court under its discretionary jurisdiction in the Petition for Writ of Certiorari in People of the State of California ex rel. Cooper, City Attorney of the City of Santa Ana, California v. Mitchell Brothers' Santa Ana Theater, et al., No. 81-271 is now squarely before this court for decision in the Idaho appeal. Because both cases present the

same issue (closure) and the same factual pattern (application of the injunction procedure is not an issue on appeal) request is made that this Court exercise its discretion and grant the writ in the California case at the same time that it acts under its obligatory jurisdiction in the appeal from the Idaho Supreme Court decision.

In bringing to the attention of the members of this Court this matter of the perfecting of an appeal in the Idaho case, Petitioner respectfully requests that this Court not rule upon the Petition for Writ of Certiorari herein until it considers the Jurisdictional Statement in the Idaho Supreme Court appeal and that both cases be considered together, under this Court's customary practice of holding related cases on the Court's docket until a definitive decision has been reached, which can be applied to all of the related

cases. See Supreme Court Practice, 5th Edition, Stern and Gressman, at page 750.

Even though such disposition would likely develop in the normal administration of the Court's business, Petitioner makes this written request out of an abundance of caution and in light of this Court's recent ruling on November 9, 1981 in Donald C. Brockett, etc. v. Spokane Arcades, Inc., et al., No. 80-1604, ___ U.S. ___, 42 C.C.H. Supreme Court Bulletin at pages 222-224, where the usual practice appears not to have been followed.[1]

---

[1] Spokane Arcades, Inc., supra, is a "related case" in as much as the Washington public nuisance statute is identical to the Idaho public nuisance statute. Notwithstanding its "related case" classification, a decision was filed by this Court in advance of its having ruled upon the Idaho appeal. While the decision in Spokane Arcades, Inc., supra, does not control the decision in U.S. Marketing, this Court's decision in U.S. Marketing may control the Spokane Arcades, Inc. case.

If this Court affirms the Idaho Judgment, the decision in Spokane Arcades, Inc., supra, will present problems for this Court. An irreconcilable conflict will arise between the two decisions which interpret a statute which is identical in every respect, the Washington statute

(This footnote is continued on the next page.)

CONCLUSION

People of the State of California ex rel. Cooper, City Attorney of Santa Ana, having used the Idaho statute as its model, simply because happenstance would have it that the challenge to the Idaho Statute arose in the Idaho State jurisdiction, and in that case the sections dealing with the injunction procedure were not made an issue by the parties on appeal. That factor allowed the Idaho Supreme Court to consider the Idaho public nuisance statute as though there had been a severance of the injunction issue. Further, the Idaho Supreme Court ruled in U.S. Marketing that the statute is severable. See State of Idaho ex rel. Kidwell et al. v. U.S. Marketing, Inc., 631 P.2d 622 at 625 and footnote 4 and, note also, State ex rel. Andrews v. Chateau X, Inc., et al., 296 N.C. 251, 250 S.E.2d 603 at 608-609. That interpretation is binding on this Court upon this appeal, see Kingsley Pictures Corp. v. Regents, 360 U.S. 684. Should the Ninth Circuit Court of Appeal in the Spokane Arcades, Inc. case, supra, be allowed to apply a different rule for the State of Washington? See, in this regard, the rule of law on severability expressed by Justice White at footnote 26 of his opinion in Metromedia, Inc. v. San Diego, ___ U.S. ___, 69 L.Ed.2d 800, 823, 101 S.Ct. ___ (July 2, 1981), which Justice White did not apply in casting his vote in Spokane Arcades, Inc.

Petitioner submits that if the U.S. Marketing, Inc. case is affirmed, the Spokane County Prosecutor and the State of Washington would be justified in claiming an unconstitutional infringement because the State of Washington had been deprived of the right to exclude the "suspect" injunction sections in their application of the identical statute, and of taking advantage of its benefits and avoiding its infirmity, as did occur in the Idaho jurisdiction.

No. 81-271 and U.S. Marketing, Inc. v. State of Idaho, No. 81-741 are related cases; i.e., each presents the same federal issue (closure) and the same factual pattern (application of the injunction procedure is not an issue on appeal). This Court's customary practice of holding related cases on the Court's docket until a definitive decision has been reached, which can be applied to all of the related cases, should be followed herein and the Court should consider and rule upon both cases at the same conference.

DATED: November 13, 1981

James J. Clancy
Attorney for Petitioner.

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of November 1981, the original and 40 copies of the within Petitioner's Reply and Supplemental Brief were deposited in the United States Post Office in Phoenix, Arizona, with first-class postage prepaid, and properly addressed to the Clerk of the United States Supreme Court.

I further certify that three (3) copies were also mailed, postage prepaid, to the below listed parties to the proceedings and that all parties required to be served have been served.

LAW OFFICES OF ROBERT L. THORP
1524 California Street
San Francisco, California 94109

James J. Clancy
9055 La Tuna Cyn. Rd.
Sun Valley, CA 91352

Attorney for Petitioner.

APPENDIX A

(Reference: Petitioner's Reply Brief and Supplemental Brief at page 3.)

Reporter's Transcript of the settlement conference in the trial court (Judge Weeks) on the Findings of Fact and Conclusions of Law on May 2, 1978.

THE COURT: OKAY. TWENTY-SIX(*) IS PROBABLY OBJECTED TO, AND IT IS. DO YOU WISH TO BE HEARD, MR. THORPE?

MR. THORPE: YES, YOUR HONOR. MAY I JUST REVIEW THIS FOR A SECOND. I ASK THE COURT'S INDULGENCE.

YES, YOUR HONOR, WE ARE OBJECTING. WE HAVE ALREADY RAISED THE ISSUE ABOUT WHAT WENT ON BEFORE OR AFTER THE PERIOD OF TIME WHICH WAS CONSIDERED IN THIS CASE, SO THAT THE STATEMENT UNDER THE FACTS OF THIS CASE, ET CETERA, YOU KNOW, THAT MY CLIENTS HAVE BEEN ENGAGING IN THIS UNLAWFUL ACTIVITY FOREVER, WE OBJECT TO. BUT SECONDLY, I OBJECT TO THE CRITICISM OF BUSCH WHICH IS FOUND IN THIS FINDING. I UNDERSTAND THAT THE COURT IN ITS CONCLUSION -- PARDON ME -- IN ITS MEMORANDUM HAD SUCH CRITICISM, AND IT IS QUITE APPROPRIATE TO HAVE IT THERE.

(*) Plaintiff's Proposed Conclusion of Law 26 became Judge Weeks' Conclusion of Law XVI. See page C-29 and C-30 of the Petition for Writ of Certiorari.

HOWEVER, AS A CONCLUSION OF LAW, IT IS NOT APPROPRIATE TO CRITICIZE THE EXISTING STATE OF THE LAW.

THE COURT: I DON'T READ ANY CRITICISM, MR. THORPE. I READ FROM 15 TO 26 AS SETTING FORTH A SET OF CIRCUMSTANCES THAT WERE IT NOT FOR BUSCH, WOULD APPEAR TO -- AND THE CONSTITUTION, WOULD APPEAR TO BE CIRCUMSTANCES THAT WOULD OTHERWISE LEND ITSELF TO AN ABATEMENT BY CLOSING OF THE THEATER. AND I DON'T READ THAT AS A CRITICISM.

MR. THORPE: I'M SORRY, YOUR HONOR. I CERTAINLY UNDERSTOOD IT TO BE SUCH. IT STRIKES ME AS SAYING THAT "I REALLY WANT TO DO THIS BUT I CAN'T BECAUSE OF THE CONSTITUTION OF THE UNITED STATES" -- PARDON ME, TO SAY: "THIS WOULD BE VERY PROPER BUT FOR THE FACT THAT WE HAVE A CONSTITUTION."

THE COURT: BECAUSE THAT IS AN ISSUE, THAT IS THE LEGAL ISSUE.

MR. THORPE: YOUR HONOR, I WOULD URGE YOUR HONOR THAT SOMETHING THAT IS UNCONSTITUTIONAL IS NOT PROPER. OKAY? SOMETHING THAT IS NOT CONSTITUTIONAL SUCH AS THE CLOSING OF THE THEATER, WHICH I BELIEVE BUSCH HAS AT LEAST IN SOME OF THE STRONGEST DICTUM I HAVE EVER READ, SAID THAT IT WOULD BE UNCONSTITUTIONAL, MEANS THAT IS NOT APPROPRIATE OR A PROPER AND SUITABLE REMEDY BECAUSE IT IS NOT CONSTITUTIONAL, AND TO SAY THAT IT WOULD BE BUT FOR THE CONSTITUTION IS TO BEG THE POINT. I WOULD ONLY ASK THE COURT --

THE COURT: BUT THERE ARE COME CASES, SEE, THE ISSUE IS NOT THAT CUT AND DRIED. THERE ARE SOME OF THESE CASES THAT, AND I DON'T WISH TO GO BACK AND DREDGE THEM UP, WHICH INDICATE THAT UNDER CERTAIN CIRCUMSTANCES THAT EVEN FIRST AMENDMENT RIGHTS MUST YIELD. AND THE REASON THAT I HAVE SAID THIS LIKE IT IS IS BECAUSE EXCEPT FOR BUSCH AND THE CONSTITUTION, IT

WOULD APPEAR THAT THIS WOULD BE A SET OF CIRCUMSTANCES THAT WOULD LEND ITSELF TO ABATEMENT BY CLOSURE, AND I DON'T -- I DON'T FIND ANYTHING IN THE NATURE OF CRITICISM OF THAT, SIMPLY A STATEMENT OF THE LAW. YOU CAN'T STATE THE LAW -- YOU CAN'T REFRAIN FROM STATING THE LAW BECAUSE YOU MIGHT BE CHARGED WITH BEING CRITICAL OF THE LAW.

MR. THORPE: OH, INDEED, YOUR HONOR. I AM ANXIOUS FOR THE COURT TO STATE THE LAW, BUT WHAT I AM NOT ANXIOUS FOR THE COURT TO DO IS TO FIND THAT THE REMEDY OF CLOSING WOULD BE PROPER EXCEPT, YOU KNOW, FOR THE SUPREME COURT.

THE COURT: ISN'T THAT THE WAY IT IS?

MR. THORPE: I DON'T THINK SO, YOUR HONOR. I THINK THAT THIS COURT SHOULD ACCEPT THE FACT THAT THE CONSTITUTION DOESN'T PERMIT CLOSING AND THEREFORE IT WOULD BE IMPROPER TO CLOSE IT.

THE COURT: I DO.

MR. THORPE: OKAY, YOUR HONOR, I AM SORRY. I DON'T WANT TO BELABOR THE POINT.

THE COURT: I THINK WE ARE TALKING CIRCLES AND WE ARE TALKING SEMANTICS, BECAUSE ALL THAT IS SAID HERE, WERE IT NOT FOR WHAT HAS BEEN SAID IN BUSCH, AND I AM PLEASED THAT THEY ARE USING THAT AND THE CONSTITUTION, THAT THERE WOULD BE NO HESITATION IN THIS COURT IN CLOSING THE THEATER. AND THE REASON FOR THAT IS, NUMBER ONE, AS I SEE IT, THAT IF THE APPELLATE COURT DISAGREES WITH MY CONCLUSION OF THE LAW AS STATED IN BUSCH AND THE CONSTITUTION, THEN THEY MAY SEE FIT TO REVERSE MY DECISION, YOU SEE, BASED ON THIS ENUMERATED SET OF CIRCUMSTANCES, AND THAT IS THE WAY I SEE IT. AND I THINK THAT THE ATMOSPHERE OF THE COMMUNITY AND THE CASES ARE SUCH THAT THE COURT, THE APPELLATE COURT, WHICHEVER ONE IT IS, HERE OR IN SAN FRANCISCO OR IN WASHINGTON D.C. SHOULD HAVE THE OPPORTUNITY TO KNOW THAT

THIS LITTLE GUY THAT IS SITTING DOWN HERE BY ASSIGNMENT FROM THE MUNICIPAL COURT RECOGNIZED THAT HE WOULD HAVE CLOSED THIS THEATER BASED ON THE LAW IF IT WERE NOT FOR THE BUSCH CASE AND THE CONSTITUTION. AND THAT'S ALL THAT I WISH TO PORTRAY IN THIS CONCLUSION. AND SO WHILE I ACCEPT YOUR POSITION THAT BECAUSE IT IS STATED THAT WAY THAT IT IS CRITICAL OF THE LAW, IT IS NOT INTENDED TO BE. IT IS SIMPLY INTENDED TO BE MY OPINION OF A CORRECT STATUS OF WHAT THE LAW IS AND WHAT THE FACTS WERE IN THIS PARTICULAR CASE.

WELL, ANYWAY, I AM GOING TO OVERRULE THE OBJECTION. THEY ARE NOTED, AND I AM GOING TO ACCEPT 26.

APPENDIX B

(Reference: Petitioner's Reply Brief and Supplemental Brief at page 8.)

Opinion of the California Court of Appeal, Second Appellate District, Division One, in People ex rel. Van deKamp v. American Art Enterprises, Inc., et al., ___ Cal.App.3d ___, 81 Daily Journal D.A.R. 3209 (October 27, 1981).

Cite as 81 Daily Journal D.A.R. 3209

(C.A. 2nd, Oct. 27, 1981)

IN THE COURT OF APPEAL

OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE ex rel. and JOHN K. VAN DE KAMP, District Attorney of Los Angeles County. Plaintiffs and Respondents, v. AMERICAN ART ENTERPRISES, INC., et al., Defendants and Appellants.	2d Civil No. 60449 (LASC No. 37091) Court of Appeal-Second Dist. FILED OCT. 27 CLAY ROBBINS, Jr. Clerk Deputy Clerk

APPEAL from a judgment of the Superior Court of Los Angeles County. William P. Hogoboom, Judge. Affirmed.

This is an appeal by American Art Enterprises, Inc., a corporation, et al., (defendants) from a judgment, rendered against them for maintaining a nuisance, awarding the People damages in the sum of

$168,000.

STATEMENT OF THE CASE

The defendants are owners of a building and its fixtures and furniture and movable property located at 21300, 21314 and 21322 Lassen Street, Chatsworth, California (hereinafter referred to as "Lassen Street Building" or "premises").

On August 22, 1972, the People of the State of California filed an action primarily under the Red Light Abatement Law (Pen. Code, §11225, et seq.), alleging that the premises were being conducted and maintained for the purpose of lewdness, assignation and prostitution and therefore were a nuisance under the laws of California. The trial court found that the building was a "nerve center of prostitution." The trial court also found that the premises were "used for prostitution" within the meaning of Penal Code section 11225. However, it also

found that the premises were being used for publication and distribution of books and magazines and that such use was protected by the First Amendment of the United States Constitution and therefore not subject to the Red Light Abatement Law.

The People appealed this decision. This court, in 1977, reversed the trial court's judgment. (People ex rel. Van de Kamp v. American Art Enterprises, Inc. (1977) 75 Cal.App.3d 523 (hereinafter referred to as "American Art (1977)"). In a published opinion, this court declared that the Lassen Street premises were "used as the headquarters of various entities constituting a corporate empire engaged in the publication and distribution of pornographic materials. The editorial, publication, administration, art, and photographic development activity of the entities are housed in the 20,000 square

feet of the 120,000 square foot building with the remainder devoted to storage of books, magazines, and photographs. One-third of the stored material consists of photographs of explicit sex activity, and one-third . . . of simulated sex, and one-third printed material without photographs. At least 100 persons are employed on the premises." (American Art (1977), at p. 527.)

This court went on to explain that the umbrella entity was American Art Enterprises, which employed staff photographers who worked from the premises and engaged the services of men and women who were photographed in every conceivable sexual act, although the said photographic activity did not occur on the premises; the photographs were published by American Art and its associated companies.

A typical example of the directing of photography of sexual activity from the

Lassen Street Building was described in People v. Fixler (1976) 56 Cal.App.3d 321, wherein it was held that procuring models to be photographed during sexual activity was pandering, in violation of Penal Code section 266i. In that case a woman named Patricia engaged in sexual acts while being photographed, and defendants provided the money to pay her and the photographer, and directed and induced her performances. The court held that this was pandering. It reasoned that prostitution in California is performance of lewd acts by a person for hire (Pen. Code, §647, subd. (b)), and pandering is procuring a person to engage in prostitution (Pen. Code, §266i). Fixler was, therefore, pandering, and the fact that photographs were taken of the sex acts of Patricia was not a defense.

In American Art (1977), the court held that, subject to constitutional

restriction, the Lassen Street Building was subject to the Red Light Abatement Law. The case was sent back to the trial court with directions that "injunctive relief pursuant to the law must be limited in scope so that infringement upon First Amendment protecton is no greater than that which government proves essential to prevention of the use of the premises to promote prostitution." (75 Cal.App.3d 527.)

The trial court then conducted further proceedings and on October 1, 1979, filed findings that on July 3, 1976, the Lassen premises had been leased by defendants to the Fisher Corporation, an unrelated electronics firm, and that the reasonable value of one year's lease of the premises was $168,000. The trial court then issued judgment awarding the People "a damage award equivalent to one year's rent" in the sum of $168,000. It

is from that judgment that this defendant appeals.

DISCUSSION

The basic issue now before us is whether the trial court was acting within the provisions of the Red Light Abatement Law (Pen. Code, §§11225-11235), and the scope of the appellate court's direction in American Art (1977) when it awarded the People $168,000 damages in lieu of evicting the tenant of defendant from the premises.

Penal Code section 11225, as it read in 1972, provided that "Every building or place used for the purpose of . . . lewdness, assignation, or prostitution, and every building or place in . . . which acts of . . . lewdness, assignation, or prostitution, are held to occur, is a nuisance which shall be enjoined, abated and prevented, whether it is a public or private nuisance." Penal Code section

11230 provided that "If the existence of a nuisance is established in an action as provided in this article, an order of abatement shall be entered as a part of the judgment in the case, directing the removal from the building or place of all fixtures . . . and movable property used in conducting, maintaining, aiding or abetting the nuisance, and directing the sale thereof . . . and the effectual closing of the building or place against its use for any purpose, and that it be kept closed for a period of one year, unless sooner released." This provision had been interpreted as vesting a trial court with equitable power, and with a broad discretion to fashion an appropriate remedy for abatement. (People v. Barbiere (1917) 33 Cal.App. 770, 775-776; Selowsky v. Superior Court of Napa Co. (1919) 180 Cal. 404.)

The 1977 American Art opinion

specifically approved the determination that the Lassen Street Building was "a place used for the purpose of prostitution." (75 Cal.App.3d at p. 529.) Once this had been determined, the Red Light Abatement Law became applicable, and the burden shifted to the defendants to show that the nuisance had been abated. (People ex rel. Hicks v. Sarong Gals (1947) 42 Cal.App.3d 556, 562.) Upon remand, defendants attempted to show abatement of the nuisance by the lease of the premises to an innocent third party, the Fisher Corporation, in 1976 while the first appeal was pending. Rather than evict the innocent tenant, the trial court chose to impose monetary damages amounting to one year's rent on the defendants. We hold, pursuant to Barbiere and Selowsky, that the trial court appropriately exercised its broad discretion by the imposition of damages, with the objective

of preventing such nuisances as this.

We hold, too, that the award of damages was a proper response to the appellate court's ruling in the 1977 proceedings involving the case at bench. It may be that that appellate court was only contemplating injunctive relief under the fact situation it faced; however, it directed that new findings be made. The circumstances, i.e., the leasing of the premised changed from the time of the appellate court's ruling and the new trial. The trial court so found. A five-year lease of the premises was made and defendants had moved out and presumptively were operating elsewhere. To evict the new tenant would not have been equitable and would not have accomplished the purpose of the law.

OTHER CONTENTIONS

Defendants contend that, since the complaint in the trial court did not pray

for damages, the trial court did not have the power to award damages. We disagree; in California, in both civil and criminal matters, liberality in pleading is the rule with the important limitation that the individuals or entities against which action is contemplated must be given fair warning of the possible consequences against which they must defend. The complaint made it clear that the People were seeking to invoke any appropriate remedy to abate the activities being carried on in the Lassen Street Building. Code of Civil Procedure section 580 states that ". . . the court may grant . . . relief consistent with the case made by the complaint and embraced within the issue. . . ." (See, also, Singleton v. Perry (1955) 45 Cal.2d 489, 499.)

Defendants also rely on the traditional distinctions in civil law made between "general" and "special" damages,

and contend that the award of damages in the case at bench did not fit in either category but was rather a penalty imposed contrary to law. We hold, however, that the damages awarded bore a reasonable relationship to the objective of prevention encompassed in the Red Light Abatement Law, specifically Penal Code section 11230, and that nothing further was required.

Defendants also rely on other civil statutes which deal with the abatement of nuisances, namely Code of Civil Procedure section 731 and Code of Civil Procedure sections 3479 and 2380, pointing out that these sections do not authorize an award of damages in an action to abate a public nuisance brought in the name of the People, as contrasted in an action brought by a private citizen. It is true that a recent decision has adopted the interpretation of these statutes urged by

the defendants (see People ex rel. Gow v. Mitchell Bros.' Santa Ana Theater (1981) 114 Cal.App.3d 923) but such interpretation of general civil law is not controlling over the broad discretion conferred on the trial courts by Penal Code sections 11225-11235 as they existed in 1972.

We affirm the judgment.

FLETCHER, J.*

I concur:

LILLIE, J.

I respectfully dissent.

It is well established that a proceeding under the Red Light Abatement Act is a proceeding in rem, "primarily against the property because it is maintained and used in violation of the law." (People v. Gifford (1921) 54 Cal.App. 182.) That is , the object of the act is to effect a reformation of the

* Assigned by the Chairperson of the Judicial Council.

property itself, rather than punish the specific acts constituting lewdness. (People ex rel. Sorenson v. Randolph (1979) 99 Cal.App.3d 183, 188-189; People ex rel. Hicks v. Sarong Girls (1974) 42 Cal.App.3d 556, 563; see also People v. Bayside Land Co. (1920) Cal.App. 257, 261 and People v. Glass Co. (1917) 35 Cal.App. 194, 198.) For this reason, dismissal of the abatement proceeding is the proper course when it appears affirmatively that the nuisance has been voluntarily abated. (See People v. Goddard (1920) 47 Cal.App. 730, 735; People v. Dillman (1918) 37 Cal.App. 415, 419.) It appears affirmatively from the trial court's finding that the Lassen premises had been leased by defendants to Fisher Corporation, an unrelated electronics firm, that the nuisance had been abated voluntarily.

Moreover, it is clear that the People

are not authorized either to claim or to receive damages. Penal Code section 11226 permits the maintenance of an action "to abate and prevent the nuisance and to perpetually enjoin" its future operation. People ex rel. Gow v. Mitchell Bros.' Santa Ana Theater (1981) 114 Cal.App.3d 923 holds that the absence of an authorization to seek damages in Code of Civil Procedure section 731 limits the remedy which the People may seek to abatement. To attempt to distinguish Mitchell Bros.', as the majority does, on the ground that the Red Light Abatement Act confers broader discretion on a court of equity than does section 731 is to ignore the clear language of the Legislature and decisional law. Penal Code section 11230 confers no discretion upon the court, but describes the action to be taken in mandatory terms. In upholding the constitutionality of the

act, People v. Barbiere (1917) 33 Cal.App. 770 noted that "the power in a court of equity to abate nuisances, whether public or private, has always been amoung the most conspicuous of the legal attributes of that tribunal, and the power specially conferred upon it by the act in question is new or novel . . . only in the nature of the particular subject to which it is thus authorized to be applied." (Id., at p. 776.) Hence it is clear that the equitable power and discretion conferred upon the court by the act is nothing more than that which the court traditionally enjoyed at common law to abate a nuisance.

I am in sympathy with the goal which the trial court attempted to achieve. The "hit and run" tactics frequently employed by similar defendants in abatement proceedings are deplorable and demand a response. However, as long as the purpose of the act remains the reformation of the

property, the remedy of damages is simply not available to the court; the fashioning of a remedy by which to thwart such tactics is a task more properly left to the Legislature. Until the Legislature undertakes that task, I would reverse and direct the trial court to dismiss the proceeding.